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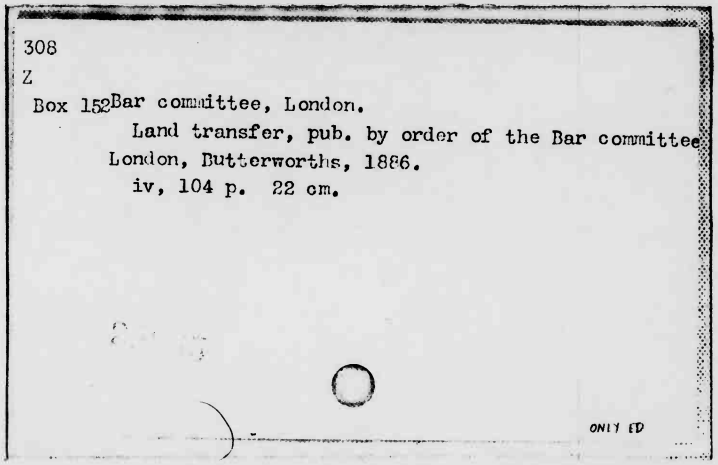

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LAND TRANSFER

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Published by Order of the Bar Committee.

LONDON:
BUTTERWORTHS, 7, FLEET STREET,
Law Publishers to the Queen's most excellent Majesty.
1886

[*One Shilling*]

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1886.

2662 8vo

Memorandum.

In November, 1885, Mr. HORACE DAVEY, Q.C., Mr. J. W. DUNNING, Mr. KENELM E. DIGBY, *and* Mr. E. W. BYRNE *were appointed to draw up a Report to the Bar Committee on the subject of the Transfer of Land.*

Upon becoming Solicitor-General, and before the Sub-Committee collectively had entered upon the consideration of the Report, SIR HORACE DAVEY *retired, and* Mr. RIGBY, Q.C., M.P., *was nominated Chairman in his place.*

The Sub-Committee, thus re-constituted, presented the accompanying Pamphlet as their Report; and in so doing they expressed their deep obligation to Mr. H. W. CHALLIS *for most valuable assistance in its preparation.*

The Report was considered and adopted at a Special Meeting of the Bar Committee, held on the 25th March, 1886, *when it was resolved that the thanks of the Committee be returned to the Members of the Sub-Committee and to* Mr. CHALLIS, *and that the Report be published.*

S. LOFTHOUSE,
HON. SECRETARY.

Feb 20, 1924
Ab—
As—

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PARLIAMENTARY PAPERS REFERRED TO.

REPORT, 1857.
Report, presented in 1857, of the Royal Commission appointed in 1854 to consider the subject of the Registration of Title, &c. (The Registration Commission).

REPORT, 1870.
Report, presented in 1870, of the Royal Commission appointed in 1868 to consider the working of Lord Westbury's Act and the Middlesex Registry (The Land Transfer Commission).

REPORT, 1872.
Return relating to Registration of Title (Australian Colonies.) Ordered by the House of Commons to be printed, 8th May, 1872.

REPORT, 1878.
Evidence taken in 1878 by the Select Committee of the House of Commons, known as "Mr. Osborne Morgan's Committee."

REPORT, 1879.
Report of the same Committee, presented, with further Evidence, in 1879.

LAND TRANSFER.

IN view of the fact that both of the chief political parties have announced their intention to promote measures for facilitating the transfer of land, it has been thought expedient to put together the following observations for the information of the profession and the public.

The question of registration, whether of titles or of assurances, is likely to occupy a prominent place in the discussion of means to effect the proposed end. For this reason it has been thought desirable to consider with attention those schemes of this nature which are in actual operation or have at different times been brought before the public.

Both the reform of the law of real property, and also the improvement of the practice of conveyancing, are intimately connected with the facilitation of the transfer of land. Such reforms and improvements have, during the last fifty years, effected very great and beneficial changes in the conditions of land transfer. The most practically successful parts of the relevant legislation have not hitherto been those which have dealt with the subject of registration, but rather those which have aimed at simplifying and improving the existing machinery. It has therefore been thought not improper that a

brief sketch of what has hitherto been effected in this direction, and of the methods by which it has been effected, should precede the examination of novel proposals.

In the following pages, remarks upon what has been done to reform the common practice have been separated from remarks upon registration; and with regard to the latter subject, what has been done, or attempted to be done, has been separated from schemes which have not yet passed beyond the region of proposal.

The present statement is restricted to the transfer of land in England (including Wales); and laws and institutions peculiar to Scotland or Ireland are noticed only by way of illustration.

Part I.

Historical Sketch of recent Legislative Reforms affecting the Common Practice of Conveyancing.

When the Real Property Commissioners of 1829 began their labours, the law of real property was nearly in the state in which it had been left by Lord Coke, while the current methods of conveyancing had acquired an enormously increased bulk and complexity. A great part of this was due to the successful ingenuity of conveyancers in devising remedies for the law's admitted defects; and it has accordingly happened, that a large part of the remedial legislation dealing with this subject is little more than the adoption into the law of the remedies devised by the conveyancers.

In some cases, where the remedy was designed to guard against a mischief, as in the case of trustees to preserve contingent remainders, and the common uses to bar dower, the law has been amended. In other cases, clauses which were always inserted in the shape of a "common form," such as covenants for title, general words, and certain trusts and powers contained in mortgages and settlements, have been made superfluous by being turned into an implication of law.

Apart from the subject of registration, the legislative dealings with land transfer may be distributed under the following heads:—

(1) The simplification of titles and shortening of conveyances; either
   (a) By amending the law; or
   (b) By superseding the necessity for the express insertion of "common forms."

(2) Reconciling free transfer with the existence of settlements, by enabling "limited owners" to deal with purchasers (in a wide sense of the term) upon a footing of absolute ownership.

The three divisions above suggested—general amendment of the law, the absorption of "common forms," and complete freedom of dealing with settled land—represent in chronological order three stages of historical development.

§ 1. *General amendment of the Law.*

The last statute which was founded upon the recommendations of the Real Property Commissioners was the Wills Act of 1837. The practical result of their labours may thus be summed up :—

(1) Titles were simplified by shortening the times of prescription for rights *in alieno solo*, and of limitation of actions. (2 & 3 Will. 4, c. 71; 3 & 4 Will. 4, c. 27.) Real actions, which had long ceased in practice, were also abolished, except Dower and *Quare impedit*.

(2) Fines and recoveries were abolished, and a substitute, easily capable of being made simple and short, was provided in the place of those cumbrous, tedious, and costly assurances. (3 & 4 Will. 4, c. 74.)

(3) The amendment of the law of dower has gradually simplified titles, and enabled the "uses to bar dower" to be omitted from modern conveyances. (3 & 4 Will. 4, c. 105.)

(4) The law of descent, including limitations to heirs as purchasers, was amended and ascertained. (3 & 4 Will. 4, c. 106.)

(5) The law relating to the execution and validity of wills was amended and codified. (7 Will. 4 & 1 Vict. c. 26.)

These Acts still constitute an important branch of the law; and the alterations which have been made in them,

with hardly any exceptions, are due to change in the opinion of the legislature. Of these alterations, the only one which here requires mention is the substitution of twelve years for twenty as the period of limitation, by the Real Property Limitation Act, 1874.

At the date of the Wills Act, freeholds in possession were commonly transferred by "lease and release"; and by the common practice, the same method was used to transfer remainders and reversions, although these may at common law be transferred by deed of grant. After certain tentative enactments (4 & 5 Vict. c. 21, s. 1, and 7 & 8 Vict. c. 76, s. 2), the old-fashioned assurance was superseded by a single deed, by the effect of 8 & 9 Vict. c. 106, s. 2.

The same Act (sect. 8) rendered superfluous the insertion of trustees to preserve contingent remainders in settlements.

Few Acts have produced a more beneficial effect in shortening abstracts and simplifying titles than the 8 & 9 Vict. c. 112, commonly called the "Satisfied Terms Act." Terms of years which had been created to secure jointures and portions, or by way of mortgage, when their purpose had been fulfilled, were not commonly reconveyed so as to be destroyed by surrender or merger, but were kept on foot and assigned to a trustee to be held for the benefit of the person entitled to the inheritance. If no such actual assignment was made, the term continued to subsist in the original termor and his legal personal representatives, who, having no beneficial interest, were treated as trustees by courts of equity to the same extent as if an assignment had been expressly made to them upon trust. Such a term would protect the inheritance against all claims arising under incumbrances made subsequently to the creation of the term, and without the privity of the person for the time being entitled to the inheritance; so that a purchaser, without notice of incumbrances created between the creation of the term and the conveyance to him of the

inheritance, could protect himself against such mesne incumbrances by means of the term. Thus the abstract of title to the inheritance was often accompanied by abstracts of the title to one or more attendant terms, and the latter title often exceeded in length the title to the inheritance. Since its chief object was to enable an action of ejectment to be maintained at law, the deduction of the title to an attendant term was peculiarly strict: it was traced from the commencement and recited at length. Moreover, where some only out of several executors had proved a will, title to a chattel interest could not (until 20 & 21 Vict. c. 77, s. 79) be deduced through the last survivor, unless he had also survived the executors who refused probate. By reason of these circumstances attendant terms were the cause of great bulk, both in abstracts and conveyances, and of much delay and expense in effecting transfers and mortgages of lands. These attendant terms have disappeared from the common practice in consequence of the Satisfied Terms Act.*

The two following points in which transfer has been facilitated by the Vendor and Purchaser Act, 1874, may be here referred to:—

(1) A forty years' title has been substituted for a sixty years' title in open contracts:

(2) Questions arising upon a contract (other than questions affecting its validity) may be decided upon summons in chambers.

The provisions of sect. 2 of the Conveyancing Act, 1882, which enable certificates to be obtained of the result of official searches, relating to matters for which searches are made at the Central Office of the Supreme Court, are also worthy of notice.

* But in *Anderson* v. *Pignet*, L. R. 8 Ch. 180, at pp. 188, 189, a peculiar meaning was given to the phrase "satisfied term," which might perhaps be found not incompatible with their partial re-introduction.

§ 2. *Statutory Substitutes for "Common Forms."*

An attempt to simplify and shorten conveyances was made by 8 & 9 Vict. c. 119, carried by Lord Brougham in 1845, which curiously foreshadows some important parts of the Conveyancing Act of 1881. It proposed to render superfluous the insertion of "general words" and the "all the estate" clause; and to provide very short forms of covenants for title and the operative part of a conveyance. It is curious that this operative part should be in the form of a release, when the previous Act of the same session had opened the certain prospect that releases would shortly be superseded by deeds of grant. This Act was entirely neglected in practice.

The same principle was greatly extended by Lord Cranworth's Act, 23 & 24 Vict. c. 145. By this Act (1) detailed provisions were made for the exercise of powers of sale vested in trustees; (2) powers of sale, &c., were conferred upon mortgagees; (3) powers of investment, maintenance and education, and for the appointment of new trustees, resembling those commonly contained in settlements, were (in the absence of anything to the contrary in the settlement) conferred by implication of law. Though this Act fell short of the hopes of its promoters, it attained some measure of success. It had little influence in superseding the insertion of powers of sale and similar powers, whether in settlements or mortgages; but the third part was not unfrequently relied upon, especially in regard to the appointment of new trustees.

The objects proposed both by 8 & 9 Vict. c. 119, and by Lord Cranworth's Act, have been completely attained by certain parts of the Conveyancing and Law of Property Act, 1881. With regard to the following points, that Act's provisions, though not compulsory, have been completely adopted into the current practice:—

(1) Covenants for title, in conveyances on sales, mortgages, settlements, reconveyances by mortgagees,

and conveyances by trustees, are contained within the compass of three or four words:

(2) "General words" are inserted only under special circumstances, and then only in an exceedingly condensed form:

(3) The "all the estate" clause, as an adjunct to specified parcels, is invariably omitted:

(4) Covenants for the production and safe custody of deeds have been superseded by short forms, styled "acknowledgments" and "undertakings":

(5) Express powers of sale, and trusts or directions as to sale moneys, and similar provisions, are no longer inserted in mortgages:

(6) Express powers of sale, vested in trustees, require no specific mention of their mode of exercise:

(7) Powers for the management of infants' property, maintenance and education, are no longer inserted in settlements, unless under special circumstances:

(8) Express provisions relating to the appointment of new trustees of settlements, are either wholly omitted, or are restricted to naming the persons by whom the statutory power is to be exercised.

But much more important changes have recently been effected in the framework of settlements by the Settled Land Acts; which belong to a different category, to be presently considered.

The following provision, by which the Conveyancing Act has in many cases practically simplified transfers of land, may here be mentioned, though it differs from the foregoing, in that its object could not have been effected without legislative enactment:—

(9) Land subject to incumbrances may, by leave of the Court, be sold free from the incumbrances, without the concurrence or consent of the incumbrancers, upon payment into Court of a sum estimated to be sufficient to cover their claims. (Sect. 5.)

A particular branch of the present subject requires separate mention; namely, the attempts which have been made to supersede the use of conditions of sale and express contracts for sale, so as to enable both sales by auction and other sales to be commonly effected upon "open contracts."

The Vendor and Purchaser Act, 1874, s. 2, and the Conveyancing and Law of Property Act, 1881, ss. 3 and 13, have laid down certain rules by which, subject to any express stipulation, contracts for sale shall be regulated. The most important of these rules closely resemble the most approved "common forms" in previous use. These rules have to a considerable extent shortened contracts for sale, but they do not appear to have made "open contracts" more common than they formerly were. This arises chiefly from the fact, that such rules cannot attempt more than to supersede the use of "common forms," while the general function of contracts for sale is to contain "special conditions." These latter are made necessary by the peculiarities of individual titles; and they would be superseded by any system which should make all titles both simple and uniform.

§ 3. *Statutory Powers of dealing with Settled Land.*

The public inconvenience of strict settlements in hampering free dealing with land has for a long time attracted the attention of the legislature; but at first their attention was directed not so much towards obstacles placed in the way of free transfer, as towards obstacles placed in the way of effecting improvements and promoting the welfare of the agricultural population. This was doubtless in great part due to the fact that, except in rare cases, every well-drawn settlement contained reasonable powers of sale and exchange, besides powers of leasing; and the existence of strict settlements did not in practice place any serious obstacle in the way of alienation, unless by increasing the expense.

The Acts for promoting agricultural improvements spring

directly from the same policy of the law as the Acts for promoting freedom of transfer; but they do not in this place require further mention.

A systematic attempt was made to reconcile settlements with free transfer, in 1856, by the first "Act to facilitate Leases and Sales of Settled Estates" (19 & 20 Vict. c. 120). This Act has been more than once amended, repealed, and re-enacted; its latest shape being the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), most of the provisions of which are still in force. These Acts enable sales and leases of settled lands to be effected with the leave of the Court of Chancery, now the Chancery Division. All these Acts contain a provision that their powers shall not be exercised if an express declaration that they shall not be exercised is contained in the settlement. It was not the common practice to insert any such declaration in settlements, and the Acts were extensively used; but the procedure under them was tedious and expensive.

Previously to the passing of the Settled Estates Act, 1856, it was necessary to apply to Parliament for a private Act, in cases where great inconvenience was caused through an estate being strictly tied up without power of sale. Such private Acts were of common occurrence, and the Settled Estates Act was intended to introduce into the ordinary law, as a part of the common practice, the rules and principles in accordance with which such private Acts were usually passed.

The Royal Commissioners appointed in 1868 to inquire into the working of Lord Westbury's Act and the condition of the Middlesex Registry, in their Report, presented in 1870, remarked upon the strictness with which the Settled Estates Act then in force required notices and consents to and on the part of persons interested; whereby it might happen that a person having only a remote and contingent interest could prevent relief from being granted. They

accordingly suggested that a larger discretion to overrule objections raised by such persons should be vested in the Court of Chancery. (Report, 1870, p. xxxi. para. 92.) This suggestion was carried into effect, in rather wide terms, by sect. 27 of the Act of 1877, which provides that the Court may dispense with the consent of a person who cannot be found, or whose interest is small or remote, or is similar to the interest of other persons concerned; and may even dispense with notice, in cases where the expense of giving it is disproportionate to the value of the subject-matter of the application.

The idea of wholly superseding what may be styled the "administrative powers" commonly inserted in settlements, and of compulsorily extending them so as to enable everything to be done with regard to settled land which seems to be required in the interest of the public, has been carried out with extraordinary success by the Settled Land Act, 1882. In connection with the present subject, its salient characteristics are as follows:—

(1) Certain statutory powers are conferred upon "limited owners," or persons having a beneficial estate or interest in the land less than a fee simple:

(2) These powers are sufficiently wide to enable the "limited owner" to do everything which a prudent and well-judging owner in fee simple would be likely to attempt:

(3) Every "limited owner" known to the law, other than persons standing in the position of leaseholders, has the powers of the Act, with the exception of widows seised in right of dower; and it is impossible for a settlor by any device to prohibit or prevent a "limited owner" from exercising his statutory powers.

Under the provisions of the Dower Act, no claim of dower can arise except upon a descent, and as against the heir-at-

law; and even this claim is liable to be barred by any declaration made by the husband in any deed or by his will. Moreover, of English land only a small proportion passes by descent. The amount of land held in right of dower is very small.

The principal end of settlements is to create a succession of limited beneficial owners of the kinds contemplated by the Act, so that it would be inconsistent with their policy to seek to prevent the existence of a person qualified to exercise the powers of the Act.

Of land not held for a fee simple in possession, only a minute per-centage is, in fact, free from the powers of the Act. But some restriction is placed upon the powers of sale and leasing, so far as regards the principal mansion-house and its demesnes. These cannot be sold or leased without obtaining either the consent of the trustees or an order of the Court. And the powers of the Act are not applicable to lands purchased with money provided by Parliament in consideration of public services.

The result of the Act has been both to shorten settlements to a fraction of their former bulk, by rendering superfluous the lengthy powers which were generally vested in trustees, and also to render land in strict settlement not less easily saleable than land held in fee simple.

The powers conferred by the Act, especially the powers of sale and leasing, are very extensively used in practice; nor is there any reason to suppose that a tenant for life often refuses to sell land to a willing purchaser, unless under circumstances which would equally deter him from selling if he were tenant in fee simple.

The result of alienation under the Act, though it liberates the land sold from the provisions of the settlement, is not

generally to destroy all effect of the settlement, but to transfer its operation from the land sold to the proceeds of sale and consequent investments. It may also be observed that in certain cases where, with a view to the public interest, a sale would be very desirable, such as the case of a hopelessly involved limited owner, though the Act enables a sale to be made, it supplies no inducement to make a sale.

The Settled Land Act, 1884, has greatly facilitated the working of the previous Act, by rendering it unnecessary for the tenant for life to give a separate notice to the trustees upon each exercise of his statutory powers.

The foregoing remarks embrace only a small part of the amendments with respect to conveyancing which have been effected in the law during the last fifty years: they are restricted to those points which bear directly upon the facilitation of transfer.

General Remarks.

The success of the foregoing enactments in shortening and simplifying conveyances has been very striking. Probably this process has not yet been carried to its furthest possible limits.

To the Conveyancing Act of 1881 were appended certain schedules of short forms of deeds. The fourth schedule contained short forms of mortgage, further charge, conveyance on sale, and marriage settlement, which were adaptations of the simpler forms in current use to the general provisions of the Act. These forms are suitable for use in simple cases of the kinds of transactions to which they refer. They have obtained a certain currency in practice; and may be expected to be still more often used, if such simple transactions should become more common.

It must be borne in mind, that one cause of complexity in

deeds is the strong tendency which exists to assert individual wishes in drawing up contracts and making dispositions. So long as owners of property (whether real or personal) are allowed to retain anything like their present freedom of dealing with their property by way of settlement, devise, and bequest, it will be impossible to reduce all conveyancing to a few simple forms. But it seems to be not impossible to extend and improve the suggestions in this direction offered by the Conveyancing Act.

Moreover, schemes have been proposed for separating that part of conveyancing which concerns the general public from that part which concerns the mutual rights *inter se* of a number of co-ordinate or successive owners, and thus reconciling simplicity in the former branch with complexity in the latter branch. An example of this method is afforded by the existing system of titles to and transfers of government stocks. As regards the legal title to the stock, the law recognizes nothing but one uniform kind of absolute ownership, vested either in a single individual or in a small body of persons holding together as joint tenants. The registered owner can make a good title as against all the world, in favour of a purchaser taking without notice of any fraud; and it is plausibly contended that this capacity fulfils all the requirements of the public interest. This does not prevent the registered owner from being bound by private contract to hold the stock in trust for other persons, in various shares and for successive interests. Such trusts, not being binding upon purchasers without notice, do not concern the public; but they are enforced in equity against the trustee, who is the registered owner; and by this means full capacity to make a title upon a sale is reconciled with the simultaneous existence of complex settlements.

The third schedule of the Act contains some still further abbreviated forms of "statutory" mortgage, transfer, and re-conveyance. These forms are regulated by certain special

provisions relating to "statutory mortgages" contained in sects. 26—29 of the Act. These forms have been little used in practice, and they are generally regarded with some suspicion by conveyancers, which seems chiefly to arise from the great difficulty of clearly expressing, in an Act of Parliament, the intended operation of a deed which is so framed as not to express its own operation. But this portion of the Act contains a novel suggestion, which could hardly be carried to perfection at the first essay; and its principle seems to admit of being further developed and improved.

Passing to the subject of free capacity to make a title, as affecting free transfer of land, it is to be observed that the success of recent legislation in effecting this end has been even more signal than its success in simplifying and shortening conveyances.

For the present purpose, all the land in the country may be divided into three classes:—

(1) Land held for a fee simple in possession free from incumbrances.

(2) Land held for a fee simple in possession subject to incumbrances; *i. e.*, mortgages or charges which admit of being paid off.

(3) Land of which there exists no owner for the time being entitled in fee simple in possession; *i.e.*, land which is subject to some form of settlement, within the meaning of the Settled Land Act, 1882.

Full capacity exists at common law to make an unincumbered title to all land included in class (1). This class will not include land held for a fee simple in possession subject to *beneficial* leases; but it must be remembered, that an owner in fee simple who creates a beneficial lease thereby makes a partial sale, which *ipso facto* deprives him of the power to effect a complete sale. Leases at or near a rack-rent are not in practice treated as incumbrances, because a

rack-rent is commonly thought to be not less eligible than immediate possession.

With regard to land of the class (2), the machinery of sect. 5 of the Conveyancing Act of 1881 enables it to be sold for an unincumbered fee simple, without the concurrence of the incumbrancers.

With regard to land of the class (3), only a minute portion is free from the powers conferred by the Settled Land Act, 1882. This portion consists (i), of a few estates like Blenheim (if, indeed, Blenheim is an example) and Strathfieldsaye; (ii), land held by widows in right of dower; and (iii), certain lands which are subject to unusual and eccentric trusts or directions for accumulation, rarely occurring in practice. Upon this point it is believed to be the general opinion, that the powers of accumulation allowed by the Thellusson Act, 39 & 40 Geo. 3, c. 98, are too wide, and might advantageously be curtailed by further legislation.

Several suggestions will appear in the sequel, which appear to embody desirable reforms in the law, such as are likely to exercise a beneficial influence upon the practice of conveyancing. The following may here be appropriately introduced.

The Statute of *Quia Emptores*, so far as it forbids subinfeudation, has for centuries ceased to have any beneficial operation whatever; while it prevents the creation of a perpetual rent in the shape of a rent-service incident to tenure. In certain parts of the country the common practice, in contemplation of building schemes, is to grant a fee simple, subject to a perpetual rent by way of rent-charge. This end (assuming it to be desirable) could be much more conveniently attained if the law permitted the reservation of a rent-service incident to the tenure, which would be effected by the repeal of the above-mentioned provision of *Quia Emptores*.

If "acknowledgments" by married women, under the Fines and Recoveries Act, s. 79, ever served any useful purpose, they have now ceased to do so. Under the provisions of the Married Women's Property Act, 1882, every woman who has been married since the beginning of 1883 can dispose of her property "as if she were a feme sole;" and every married woman whatever may dispose in like manner of all property, the title to which has accrued since that date. It appears, therefore, that "acknowledgment" is necessary only to dispositions by women married before 1st January, 1883, of property to which they were entitled before that date. It is impossible to assign any sufficient reason for this distinction; and it is suggested that "acknowledgments" should be altogether abolished.* Acknowledgment now costs the sum of 2*l.* 10*s.*†

* Provision for abolishing "acknowledgments" was made in the Bill of the Conveyancing and Law of Property Act, 1881; and again in the Bill of the Conveyancing Act, 1882. In the former case, the clause was rejected in committee. In the latter case, the clause was modified so as to retain "acknowledgments," but to allow them to be made before one commissioner only. (See Conv. Act, 1882, s. 7, subs. 1.)

† By the Treasury Order as to County Court Fees, dated 12th February, 1886, and appended to the County Court Rules, 1886, which will come into force on the 28th April, 1886, the fee for taking the acknowledgment of a married woman, where only one, is 1*l.*, and 10*s.* for every additional woman. (See 19 & 20 Vict. c. 108, s. 73, as to acknowledgment before a County Court judge.)

Part II.

Systems of Registration now existing in Great Britain.

It is proposed now to enter upon some historical sketch of the registration both of deeds and of titles.

The registration of titles amounts practically to registering the effect produced, or intended to be produced, by deeds (or other assurances), without necessarily registering, or even noticing, the deeds themselves. When a deed is registered, it acquires no validity or authenticity which it would not otherwise have had; and even where the registration is made compulsory, it amounts only to the fulfilment of a preliminary condition, which the law enjoins upon persons claiming under the deed, before they are permitted to assert the title which has been gained by it. Thus, registration of deeds commits the law to no statement of fact, except that a given document (or memorial) was filed in a given place at a given time; but registration of titles further commits the law to some statement as to the legal effect produced by some document or act, in vesting some specified title (whether indefeasible or defeasible) in some specified person or persons.

Registration of deeds also differs in its object from registration of titles. The principal object of registering deeds, is to prevent fraud by securing publicity to every transaction. The principal object of registering titles is to facilitate and cheapen transfer. Its object may include also the prevention of fraud by means of publicity; but the latter object is subordinate.

Some forms of public registration were familiar to the common law for centuries before the establishment of separate registries. Fines and recoveries, as assurances of record, may be regarded in the light of registered deeds. Long before the Court of Common Pleas existed as a separate court, deeds of unusual importance were executed in the Exchequer and there recorded;* and fines appear to have been there levied. In imitation of these precedents a great number of isolated enactments have prescribed some form of registration for particular kinds of documents relating to particular classes of matters:—

(a) Inrolment of bargains and sales of freeholds, under 27 Hen. 8, c. 16 (the Statute of Inrolments).
(b) Inrolment in Chancery of disentailing deeds of freeholds, and deeds of consent by "protectors" of settlements, under 3 & 4 Will. 4, c. 74, ss. 41, 46.
(c) Inrolment in the manor rolls of disentailing deeds of equitable estates in copyholds, and deeds of consent by "protectors," under 3 & 4 Will. 4, c. 74, s. 53.
(d) Inrolment in Chancery of deeds of gift to charitable uses, under 9 Geo. 2, c. 36, commonly (but improperly) styled the Mortmain Act.
(e) Voluntary inrolment of certain kinds of deeds affecting titles to land is also permitted by certain enactments: *e. g.* the Settled Land Act, 1882, s. 16. Compare the Conveyancing Act, 1881, s. 48, which permits original instruments creating powers of

* In the 11th year of Hen. 2, a charter made between the Abbot of St. Alban's and others of the one part, and the Abbot of Westminster of the other part, was executed at the Exchequer, before several of the justices and the King's chamberlains and marshals. (Madox, Hist. Exch. p. 30.) In the 29th year of the same King, a final concord was had in the King's Court at Westminster in the Exchequer, between the Prior and Monks of Rochester, and Juliana, daughter of Fulk de Neweham, and Robert, her son, concerning the advowson of the church of Northtone. (*Ibid.* p. 57.)

attorney to be deposited at the Central Office of the Supreme Court.

(f) The principle of compulsory registration has been extended to other deeds and documents indirectly affecting titles: judgments, grants of annuities, *cognovits* and warrants of attorney, crown debts and recognizances, suits by way of *lis pendens;* also bills of sale.

These kinds of registration do not here require further remark. But the statement of them suggests the question, Whether the whole of this heterogeneous mass of legislation is of benefit to the public; and whether the abolition, or absorption, of part of it might not profitably be made a feature of any novel scheme of registration.

The second class of enactments prescribing registration comprises those Acts which relate only to limited areas or particular districts, but include all kinds of deeds and assurances *inter vivos*, and generally also wills:—

(a) Registration of deeds relating to lands in the Bedford Level: 15 Car. 2, c. 17, s. 8. The effect of registration is to cause the deed to operate as a bargain and sale inrolled; and in default of registration it loses the particular privileges conferred by the Act, without losing any validity which it may possess independently. (*Willis* v. *Brown*, 10 Sim. 127.)

(b) Registration of memorials of deeds, conveyances and wills in Ireland: established Ir. St. 6 Ann. c. 2; amended 3 Geo. 4, c. 116.

(c) Registration of memorials of deeds, conveyances and wills in the county of Middlesex: 7 Ann. c. 20.

(d) Registration of memorials of deeds, conveyances and wills in the county of York:—West Riding, 2 & 3 Ann. c. 4, amended 5 & 6 Ann. c. 18 (=6 Ann. c. 20, Stat. Rev.); East Riding and Kingston-upon-Hull, 6 Ann. c. 35 (= c. 62, Stat. Rev.); North Riding, 8 Geo. 2, c. 6. The provisions of these Acts have been amended and consolidated by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54); and further amended by the Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26).

The Middlesex Registry.

A great mass of information relating to this registry is contained in the proceedings of the Royal Commissioners of 1868, published in 1870, and of the Select Committee of the House of Commons, appointed in 1878 and 1879, known as Mr. Osborne Morgan's Committee.

The preamble to the Act establishing the registry (7 Ann. c. 20) recites that it was passed "at the humble request of the justices of the peace, gentlemen, and freeholders of the county of Middlesex." This Act has never been amended, so far as regards its operation and principles;* except that now, by the Vendor and Purchaser Act, 1874, s. 8, a title under an assurance by a devisee (or his assigns), claiming under an unregistered will, prevails over a prior title derived through the testator's heir-at-law, if the former assurance is at any time registered before the heir's.

The failure of this registry to confer upon the public the benefits which were expected from it has, at all events in modern times, been complete. The Royal Commissioners in 1870 were unanimously of opinion, "that the registry causes a great increase of trouble and expense, affords no additional security or other special advantage;" and they recommended its abolition "from as early a date as possible." (Report,

* The Acts, 25 Geo. 2, c. 4, s. 1; 7 Will. 4 & 1 Vict. c. 30, s. 23; 5 & 6 Vict. c. 103, s. 34; 22 & 23 Vict. c. 21, s. 7; relate only to the office of registrar.

1870, p. xxxvii.) Mr. O. Morgan's Committee state that, "the Middlesex Registry is unhesitatingly condemned by every witness who has tried it." (Report, 1879, p. ix.)

The causes of this failure appear to be as follows:—

(1) An extremely defective and dilatory method of keeping the register. Mr. O. Morgan's Committee observe, so lately as 1879, that "nothing can be more unsatisfactory than the index of the Middlesex Registry. Though improved of late, it consists simply of an index of names for each parish, generally in arrear for several months." (Report, 1879, p. x.)

The Act (sect. 6) appears to have contemplated a topographical index. This is said, on being attempted, to have been found practically impossible; and the attempt was discontinued after 1717. (Report, 1870, p. xxxv.) An alphabetical index of the names of grantors was then instituted and continued. This index was not, until 1829, arranged with reference to any letter of the name beyond the first.

(2) The extreme populousness of the county of Middlesex, some of the parishes in which contain more inhabitants than several counties together; and the enormous extent of particular building transactions entered into by particular individuals. (Report, 1879, p. x.) Thus a search either in a common name, such as John Smith, or in the name of a great building proprietor or contractor, such as the Duke of Westminster or Mr. Cubitt, might be a hopeless undertaking, involving great delay and great expense, with a considerable chance, after all, of missing the particular information sought, and with the further grievance of being fixed with notice

of it because a search has been made. For the period during which the index was in arrear, it was of course necessary to peruse the actual memorials.

The late Mr. Joshua Williams, Q.C., stated in evidence, before Mr. O. Morgan's Committee, that the cost of a search in this Registry sometimes amounts to 30*l.* or 40*l.* (Report, 1878, p. 26, No. 440.)

(3) The decision of Lord Hardwicke in *Le Neve* v. *Le Neve*, 3 Atk. 646, Ambl. 436; to the effect that a purchaser or mortgagee is bound by prior dealings with the land, though not registered, of which he has notice, either personally or through his solicitor or other agent. But the mischief done by this decision has sometimes been exaggerated. Mr. O. Morgan's Committee appear to have supposed that its principle includes all notice which is called "constructive notice." (Report, 1879, p. x.) But though the case has been often cited, it has never been held to extend to anything except actual notice, either to the principal or his agent. Otherwise, since nothing can eliminate the risk of constructive notice, except a careful examination of the documentary title by a trained expert, the decision would have turned the registry into a mere public nuisance.

(4) It may be doubted whether the decision of Lord Camden in *Morecock* v. *Dickins*, Ambl. 678, that registration is not by itself notice, and therefore that a registered *puisne* incumbrancer cannot prevent "tacking" by a subsequent puisne incumbrancer, if the latter has omitted to search the register and is otherwise without notice, is not more calculated to injure the efficacy of the register, than the decision in *Le Neve* v. *Le Neve*. But the deci-

sion of Lord Camden is much more obviously warranted by the language of the Act than the decision of Lord Hardwicke.

It may well be doubted whether the whole doctrine of "constructive notice" has not been found in practice to do more harm than good, and whether it might not with advantage be wholly abolished by statute, thus extending the policy of the Conveyancing Act, 1882, s. 3.

The equitable jurisdiction of the Court of Chancery was on the whole productive of great benefit. But the Court sometimes failed to understand, that it is not worth while to sap the policy of an Act of Parliament for the sake of preventing a few isolated cases of sharp practice. So strong is the tendency of Judges in this direction, that very explicit language would be required to effect the proposed object, as will appear from the next-following paragraph.

By the Irish Registration Act, Ir. St. 6 Ann. c. 2, *express priority* is given to registered instruments in the order of registration: unlike the language of the Middlesex Act, which merely makes registration a *condition precedent to asserting a title* against purchasers for value. This precisely illustrates the distinction between *Le Neve* v. *Le Neve* and *Morecock* v. *Dickins*. It is accordingly well settled, that the principle of the latter case does not apply to Irish registration; and that the owner of the legal estate must give effect to all prior equitable registered transactions, though he have no actual notice of them. But Lord Cairns in *Agra Bank, Limited*, v. *Barry*, L. R. 7 H. L. 135, at p. 148, plainly lays it down, as being settled law, that the principle of *Le Neve* v. *Le Neve* is applicable even to Irish registration, and that actual notice, either to the principal or the agent, of a prior unregistered charge, will deprive a subsequent registered charge of its statutory priority.*

* Lord Cairns seems to have relied upon the case of *Blades* v. *Blades*, 1 Eq. Ca. Ab. 358, pl. 12, which was a case in Yorkshire; but he did not advert to the different language of the Acts.

Mr. O. Morgan's Committee recommended that, under their proposed scheme, registration should be decisive as to priority, except in cases of actual fraud on the part of the party registering. (Report, 1879, p. xiv., para. viii.) Their remarks upon *Le Neve* v. *Le Neve* show that they strongly disapproved of the decision. It seems probable that they would not have approved of the above-stated view taken by Lord Cairns.

The policy above suggested was adopted by the Yorkshire Registries Act, 1884, which (sect. 14) expressly enacts that no person shall lose any priority given by the Act merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud; also (sect. 15) that registration shall constitute actual notice to all persons and for all purposes; but this section has been repealed by the Yorkshire Registries Amendment Act, 1885, s. 5. It would seem to follow, from sect. 15, without express enactment, that registration would be a sufficient notice to prevent the "tacking" of mortgages; but it is expressly enacted by sect. 16, that in future no priority or protection shall be given by the legal estate.

The abolition of "tacking," including all protection given by the legal estate, could not be effected without great stringency in enforcing registration, because no mortgage could safely be made, in the absence of protection from the legal estate, unless the mortgagee could rely with absolute certainty upon the state of affairs disclosed by the register. This consideration accounts for the very stringent provisions of the Act of 1884 with regard to notice. But this stringency rendered it unsafe for a mortgagee to make further advances, or for a banker to permit fresh drafts, upon a general mortgage to secure an account current, without searching the register before each fresh advance or draft. This was found to cause great inconvenience in practice; which was probably intended to be removed by the repeal of sect. 15 of the Act of 1884, by the Act of 1885. But it is extremely

doubtful whether this design will not be found to have completely failed, by reason of the omission also to repeal sect. 16. Protection by the legal estate is no less necessary than the absence of notice; and it seems to be useless to provide for the absence of notice, without also providing for protection by the legal estate.

The Yorkshire Registries.

The three separate registries established under the repealed Acts, for the North Riding at Northallerton, for the East Riding and Kingston-upon-Hull at Beverley, for the West Riding at Wakefield, are continued by the Act now in force for the whole county, the Yorkshire Registries Act, 1884, 47 & 48 Vict. c. 54, amended by the Yorkshire Registries Amendment Act, 1885, 48 & 49 Vict. c. 26.

The Yorkshire registries appear to have enjoyed for many years the great advantage of having been very efficiently conducted, and the indexes seem to have been kept regularly posted up to date. (See Report, 1878, p. 129, Nos. 2731, 2732.)

Considerable improvements in matters of detail have been effected by the recent Act, and the provisions of sects. 14 and 16, respecting notice above referred to (*supra*, p. 25), have made a search in the register an indispensable auxiliary to the title. The Yorkshire registries have long been popular in the county, but it seems to be an open question whether their popularity and usefulness have been increased by the recent Acts.

Attention may be directed to some evidence given by Mr. Pickard, Deputy Registrar for the West Riding, to Mr. O. Morgan's Committee. (Report, 1878, p. 129, Nos. 2742—2754, and p. 132, Nos. 2827—2830.) He states that searches are frequently made in the West Riding registry by persons who have no intention of entering upon any dealing whatever with the lands to which the searches relate, and that this is

done sometimes with a view to test the solvency of landowners, but more frequently for the avowed gratification of a mere impertinent curiosity. The form of memorial commonly adopted in the West Riding appears, however, to have given little information beyond the bare fact that some dealing with the particular lands had taken place; and it does not appear that the form prescribed (sect. 6) by the recent Act will give much more. It seems that in Ireland searches are seldom made out of mere curiosity, though often with the motive of ascertaining whether a proposed borrower is solvent. (Report, 1879, p. 126, Nos. 2508—2511; p. 135, No. 2680.)

Lord Westbury's Act (sect. 15) permits searches to be made only by the following persons—(1) owners of registered interests; (2) owners of registered incumbrances; (3) their respective solicitors or agents; (4) persons authorized by order of the Court of Chancery.

Rule 57 of the General Rules made under the Land Transfer Act, 1875, seems to impose a sufficient restriction upon improper searches.

The Dublin Registry.

The Irish registry of deeds, established by Ir. St. 6 Ann. c. 2, closely resembles in its procedure that of the Middlesex and Yorkshire registries; except that there is only one central registry for the whole country, which is situate at Dublin. It seems until about thirty years ago to have been worse managed even than the Middlesex registry. (Report, 1879, p. 99, Nos. 1968, 1969.) It is now kept in much better order. A very competent witness, Mr. D. H. Madden, stated in 1879, that he thought the Irish registration of assurances perfect. (*Ibid.* p. 123, No. 2470.)

Certain peculiar circumstances caused the registration of titles to start with a fairer prospect of prompt success in Ireland than in England; and it is convenient here to introduce some remarks upon the subject. The excessive ex-

travagance of the smaller landed proprietors and the recklessly bad conveyancing of their legal advisers had, towards the earlier part of this century, brought about a double result: —(1) That the greater part of the proprietors below the first rank were hopelessly insolvent; and (2) that their titles were frequently in such a state as to make it absolutely impossible, under the ordinary law, to realise their property for the benefit of their creditors. The fact that in Ireland a judgment was assignable at law, and that such assignments were commonly used to create charges, tended to involve the title to a heavily incumbered estate in an almost inextricable complexity. A common law title was in many cases impossible; and it became absolutely necessary to institute some method of granting a parliamentary title. So early as the year 1849, temporary Commissioners were appointed for effecting this object, by 12 & 13 Vict. c. 77; and several subsequent Acts* continued the same policy. The result of the procedure before the Commissioners in disposing of incumbered estates was so successful, that in 1858 it was determined to establish a permanent Court in Ireland for the sale of land, whether incumbered or not. The "Landed Estates Court, Ireland," was accordingly constituted by 21 & 22 Vict. c. 72. There had never been any compulsion to resort to the Commissioners, except in so far as the insolvency of a landowner might make it necessary to sell his property, and the state of his title might make a sale practically impossible without their aid. But the prevalence of the conditions above indicated sufficed to procure for the Commissioners a wide sphere of activity; and experience of the benefits derived, and doubtless a continuance of the same conditions, caused the new Court to be much resorted to. A very great part of the land in the country was practically unsaleable, and necessarily "passed through" the Court; thereby acquiring the starting point of a new and indefeasible parliamentary title, and the process is still going on. (Report, 1879, p. 99, Nos. 1960—1964; *ibid.* p. 102, No. 2036.)

* 15 & 16 Vict. c. 67; 16 & 17 Vict. c. 64; 18 & 19 Vict. c. 73; 19 & 20 Vict. c. 67.

The existence of a great number of newly created indefeasible titles, seems to remove the most formidable obstacle to the establishment of a register of them. The Record of Title Act (Ireland), 28 & 29 Vict. c. 88, was passed in 1865, bearing much resemblance to Lord Westbury's English Act of 1862. Any title guaranteed by the Landed Estates Court could be put upon the register at the time of the purchase from the Court, without expense or trouble. Therefore, the Irish Act might reasonably have hoped for a prompter success than the English; because, as recent experience has now taught us, the great difficulty in England has been, to persuade proprietors voluntarily to submit to the expense and trouble of an official investigation of their titles, for the sake of obtaining a future, and therefore to them individually an uncertain, advantage. But in Ireland the system of official investigation was already in very active operation; and it might reasonably be expected that the additional advantage of registration would readily be accepted.

The more favourable conditions existing in Ireland procured for the Irish Act an extent of application which is wide in comparison with that of the English Act of 1862. But this, nevertheless, was so moderate, as to afford ground for little but disappointment. By the end of 1871, rather less than 500 titles altogether had been placed upon the Irish registry; and a very competent witness has estimated this to mean, that only about one-sixth of the sales and purchases made during that period had been conducted under the machinery provided by the registry. (Report, 1879, p. 100, No. 1983.) In the year 1879, the total number of registered titles seems to have been only 681. (*Ibid.* p. 117, No. 2347.)

It must be observed that the favourable opportunity for establishing registration in Ireland, as a common foundation

of title, which was presented by the extensive operations of the Landed Estates Court, seems not to have had a very fair trial. The Government refused to establish a separate department for the purpose, and required the additional business of registration to be undertaken by the officials of the Court. The death of Judge Hargreave in April, 1866, who took a far deeper interest in the new Act than any of the other judges, was a heavy blow to its prospects. The success of the Act was, doubtless, also impaired by the course adopted by the Landed Estates Court, of supplying *gratis* to purchasers a printed form of request excluding the purchased property from the registry. It has been said that purchasers sometimes signed these forms at the request of their solicitor, without understanding the effect of them. (Report, 1879, p. 101, No. 2003; *ibid.* p. 107, Nos. 2111, 2112.) This proceeding naturally tended to injure the spread of the registry, because when once a purchase from the Court had been completed without registration, the title could no longer be put upon the register with the same freedom from expense and trouble.

But it is also to be observed that Mr. McDonnell, one of the official examiners of title to the Court, and also one of the recording officers appointed for the purpose of carrying out the provisions of the Record of Title Act, in his evidence before Mr. O. Morgan's Committee, expressed a by no means favourable opinion of the system. He stated as his opinion —(1) that under it there is an appreciable risk of error, by which irreparable mischief might be done; and he specified three examples of such errors which had come under his own notice, though they were fortunately rectified in time to prevent mischief; (2) that mere *caveats* afford no efficient protection to persons having interests adverse to the person registered as owner; because, when such persons change their address, they do not in fact communicate the change to the office with any punctuality, so that the habitual carelessness in this respect of the public exposes them to the risk of losing their whole interest; (3) that if he were himself purchasing land, he would not put his own title upon the register; and

(4) that he thought it would be better to discontinue the register. (Report, 1879, p. 109, Nos. 2135—2153; p. 117, Nos. 2335—2339; p. 111, Nos. 2189—2194; p. 113, No. 2240; p. 111, No. 2174.)

The Declaration of Title Act, 1862.

(25 & 26 Vict. c. 67.)

The following is the effect of the main provisions of this Act, which was evidently suggested by the success of the Irish Landed Estates Court:—

(1) Any person claiming, or having power to appoint or acquire, a fee simple in possession, whether beneficially or as trustee for sale,* and whether subject or not to incumbrances, may apply by petition in Chancery for a declaration of his title:

(2) The title propounded by the petitioner is investigated in the same way as upon a decree for specific performance:

(3) If the title should appear to be such as the Court would force upon an unwilling purchaser, a decree *nisi* is made for establishing the title after a time limited for receiving objections:

(4) Such advertisements and notices are given as the Court may direct:

(5) Any person may petition the Court against the declaration of title:

(6) Upon the expiration of the time limited, without any satisfactory objection having been established, the Court finally makes the declaration of title, either absolutely, or subject to specified restrictions:

* The language of the Act is loose and obscure; but this is conceived to be its effect.

(7) Six months are given for appeal to the Court of Appeal, and six months for appeal to the House of Lords.

(8) A certificate of title is issued in accordance with the terms of the declaration, or the land may be parcelled into lots, with separate certificates for separate lots:

(9) Such certificate entitles the holder to registration of title under Lord Westbury's Act, or it may be used independently as a separate, single, and indefeasible document of title:

(10) A petition may be presented by any person "aggrieved," for the recall or variation of the final declaration; but no proceedings had thereupon shall affect the title of a purchaser for value.

This Act has been completely a dead letter from its commencement. No General Orders were ever issued under its powers, and no application under it was ever made to the Court of Chancery.

The following seem to be the causes which led to this complete failure to adapt to England a system which in Ireland had been eminently successful:—

(1) The proposed object is one which could only have been effected by constituting a special Court with special machinery adapted to the purpose. The Court of Chancery (a remark which is, of course, equally applicable to the Chancery Division) was entirely destitute of any suitable machinery.

It must not be assumed, because in certain kinds of actions sales are made "in Court," that therefore there is any intrinsic resemblance between the action of the Court of Chancery in conducting such sales and the action of the Irish Landed Estates Court. An English sale "in Court" is in all its essential features identical with a sale out of Court; the only difference being, that what is done practically out of Court is reported to the Court, and that a reference can be made to the Court if disputes should arise.

(2) When the Irish Landed Estates Court was finally established, the change was confined to the confirmation and extension of a scheme which had already been practically worked, with great success, for ten years, by means of what was practically a special Court, nominally temporary, but really permanent. It is by no means certain that if in 1849 an Irish version of the Declaration of Titles Act had been passed, with permission to present petitions to the Irish Chancery, and so forth, any great success would have attended such a measure.

(3) There never existed in England anything bearing the faintest resemblance to the state of things which in Ireland made a new system of parliamentary titles a necessity, and therefore made it a success. Whatever may be the defects of the English system of conveyancing, they are at all events not such as to justify the language of unmeasured reprobation in which it has sometimes been assailed. There never was any widespread insolvency among English proprietors; and only in rare cases was there any serious difficulty in conducting the sale of a heavily incumbered estate under the ordinary law. This is the same thing as to say that in England there was an almost total absence of those conditions which had forced vendors and purchasers in Ireland to have recourse to parliamentary assistance.

Lord Westbury's Act.

(25 & 26 Vict. c. 53.)

This Act for the first time established in England a register of titles, properly so called, as distinguished from a

register of evidence of title. It will be found that this Act's provisions in some respects departed widely from the recommendations of the Royal Commission appointed in 1854, "to consider the subject of the registration of title with reference to the sale and transfer of land, and generally to inquire into and consider the advantages and disadvantages attending such a system," whose Report was presented in 1857. The subject of registration had previously attracted a great deal of attention, and more than one Bill dealing with the subject had passed the House of Lords and been sent down to the House of Commons. It may perhaps be gathered from the Report, that the distinction between a *register of titles* and a *register of assurances, regarded as a means to display titles*, had not until then been very clearly apprehended.

The following list of some principal points with which every system of registration of titles must deal, will be found useful for purposes of comparison :—

(1) The nature of the interest registered.
(2) The persons upon whose application the registration may be effected.
(3) The title required to be proved before registration.
(4) The *forum* which is to decide as to the sufficiency of the proof.
(5) The effect of registration upon existing and future rights; including the effect of fraudulent entries upon the register.
(6) The method of protecting unregistered interests.
(7) Whether the adoption of the system shall be voluntary or compulsory; and whether a title once registered may be withdrawn from the register.

The recommendations made in 1857 by the Royal Commissioners of 1854 are thus summed up by the Royal Commissioners appointed in 1868, to consider the working

of Lord Westbury's Act and the condition of the Middlesex Registry, who presented their Report in 1870*:—

> The plan recommended by the Report of 1857 may be stated, in its main features, as follows:—(1.) The leading principle is, that the fee simple title alone should be registered, subject, however, to the exception that charges and leases should have a separate registry of their own. (2.) The Report proposes that beneficial interests in the land not amounting to the fee, and dealing with such interests, should not be registered, or at least not inserted into the register of the fee; for that such a system would practically amount to a registry of assurances. (3.) That the registered title should not necessarily amount to a Parliamentary or unimpeachable title; that interests created before the commencement of registration should not necessarily be affected by it. (4.) That equitable interests should be protected by cautions or notices on the register. (5.) That it should be competent to a landowner to register with a statutory or indefeasible title if he desired it, and that such title should be guaranteed by the State. (6.) That all registered titles should be subject to easements, general charges, and ordinary occupation leases. (7.) That both central and district registries should be established. (8.) That the authority of the Registrar should be ministerial and executive in its nature, and not judicial.† (Report, 1870, p. x, par. 3.)

Some of the points specified in the list above given are dealt with very differently by Lord Westbury's Act and by the subsequent Act of Lord Cairns, which latter Act is much more nearly in accordance with the recommendations of the Report of 1857. The following is a brief outline of Lord Westbury's method:

(1) The registry is confined to estates of freehold tenure and leasehold estates in freehold lands.

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* A fuller account of this Commission will be found below, under the discussion of the Land Transfer Act, 1875, of which it was the precursor.

† The numerical divisions have been inserted into this passage, and the specific references to the paragraphs of the Report of 1857 have been omitted.

By the interpretation clause (sect. 140), "land" includes "messuages, tenements, and hereditaments, corporeal and incorporeal." The definition given by 13 & 14 Vict. c. 21, s. 4, is not expressly excluded.

The Act departed entirely from the first recommendation of the Report of 1857, with regard to admitting nothing but the whole fee, as a single entity, to the register. The register was so constructed as to present a complete picture of the existing state of sub-division of the fee, specifying not only derivative estates and interests, but also powers.

With regard to incumbrances prior to the registration, they are mentioned in the register only upon the principle of *quantum valeat:* the title registered is, in fact, an indefeasible title to the equity of redemption, without any warranty of the mortgage. Thus, the prior mortgagee is left to the ordinary law to assert his claim. If that claim should be made good, then the title registered will be, in fact, the title to an equity of redemption; but if the claim of the mortgagee should be unfounded, invalid, or otherwise defeasible, its failure places the registered title in the position of an unincumbered fee simple. (Report, 1870, p. 3, Nos. 42, 43.) But mortgagees whose title arises subsequently to the registration, of course get the benefit of the indefeasibility of title thereby acquired.

(2) Application can be made only by the person having, or having power to acquire or to dispose of, the *whole fee;* or by the several persons having collectively this title or capacity.

There is a separate register for leasehold interests: (i) for years, with not less than fifty years unexpired; (ii) for lives, or years determinable with lives, two lives being subsisting. These are treated as separate and independent subjects, and the proceedings for their registration, and the consequences of registration, are, *mutatis mutandis*, the same as for the fee simple. But the registration of a leasehold interest as indefeasible does not operate as a warranty of the title of the lessor.

No application for registration by a leaseholder was ever made under Lord Westbury's Act.

The question whether the register should be confined solely to the whole fee as a single entity, or should also show the existence of particular estates and partial interests, constitutes one of the main dividing lines between rival systems of registration. Systems which show nothing but the whole fee, or the person or persons capable of making a title thereto—without any discrimination *inter se* of separate interests—bear a close analogy to the systems in use for the registration of government stocks, referred to above at p. 14.

Under Lord Westbury's Act the whole of the "existing estates, powers, and interests in the land" are recorded. Thus it appears that particular estates can be placed upon the register; but, in the first instance, only as the result of the *collective registration of the whole fee.*

(3) The title required to be shown, on an application to register a title as indefeasible, must be what is known as a "valid marketable title"; *i. e.*, such as would be forced by Courts of Equity upon an unwilling purchaser.

This question illustrates one of the great difficulties besetting the whole subject. On the one hand, it is a serious proposal, that the State should undertake to warrant a title, and enforce it even as against strangers to the proceedings, upon any proof less rigorous than strict proof of a marketable

title. On the other hand, it is well known that willing purchasers are usually prepared voluntarily to abate somewhat from this rigour. And it is certain that the unbending imposition of this high standard would partly explain the fewness of the indefeasible titles registered under the Act. Proprietors will not, without some strong practical motive, enter upon the inquiry whether they have or have not a marketable title; and still less readily will they do so in public, under the risk that a failure may become generally known. These considerations, as will presently be seen, induced Lord Cairns to admit a lower standard.

The application is not necessarily for registration with an immediate indefeasible title; but it may be of a provisional character. In the latter case, the registrar is empowered to determine upon what conditions, including the lapse of a specific time, the title shall, in the absence of objection appearing, be qualified to be registered as indefeasible.

However, it will be observed that a conspicuous feature of Lord Westbury's Act is the absolute indefeasibility, either present or future, actual or potential, of all titles registered under it. This also was thought to have been one of the great obstacles to the Act's success; and accordingly, as will presently be shown, Lord Cairns' Act adopted a different policy.

(4) No separate Court, analogous to the Irish Landed Estates Court, is constituted. The registrar is made the *forum*, to determine, in the first instance, all questions, subject to appeal (and with power to refer cases) to a Chancery judge nominated for the purpose by the Lord Chancellor. It is not clear (sects. 13, 17) that if such judge should think fit, he might not determine any question (at all events, any question in the nature of a requisition upon title)

finally and without appeal. But perhaps sect. 134 was intended to apply, *inter alia*, to references made to the nominated judge.

As the rights at stake are, in most people's opinion, among the most important, and the questions arising are undoubtedly among the most intricate and difficult, the imposition of any closer restriction upon appeals in registration proceedings, than is imposed upon appeals in ordinary actions in the High Court, must involve an obvious inconsistency.

A closer restriction in point of time is imposed by the Declaration of Titles Act. Under Lord Westbury's Act, the time for bringing appeals, if to the Court of Appeal, is to be fixed by the Lord Chancellor, and if to the House of Lords, by the House.

(5) The indefeasible title conferred by the record of title is binding only for the purpose of sales, mortgages and contracts for valuable consideration. (Sect. 30.)

It is subject—

(*a*) to any restrictions specified therein:

(*b*) to registered charges and incumbrances:

(*c*) to certain liabilities of a public nature, not directed to be entered on the register, though, if known to exist, they may be noticed therein:—land-tax, succession duty, tithe rent-charge, crown rents, public rights of way, liability to repair highways by reason of tenure:

(*d*) to certain private liabilities, placed on the same footing:—easements, manorial rights or franchises, leases or agreements for ordinary occupation leases.

These last two classes either easily admit of discovery upon proper inquiry, or are such as

a purchaser for value has always been expected to protect himself against at his own peril.

When the Act was passed, the persons registered as having the title to dispose of land in settlement would of course be the persons who, if in being and *sui juris*, could have made a title under the settlement. The Act (except in so far as it gives absolute validity, for the benefit of a purchaser for value, to a transaction founded upon fraud, which would have been only partially protected in equity) creates no power to make a title which might not have been made under the ordinary law.

It is obvious how greatly, in this respect, the working of schemes of registration has been facilitated by the Settled Land Act, 1882; which makes it now possible to register the tenant for life solely, as the person having power to dispose absolutely of the fee; subject, perhaps, to a *caveat* in favour of the trustees. Indeed, until the passing of the last-mentioned Act, it was difficult to provide in practice for the recommendation of the Report of 1857, that the register should treat the whole fee as a single entity, and take no notice of particular estates and interests:—unless by confining the register to lands of which there was for the time being an owner in fee simple in possession. But of this the result would have been, that a title already upon the register must have been *ipso facto* taken off, if the lands should be settled by a settlement containing no power of sale.

The possibility of commodiously fulfilling that requirement seems to depend upon the fulfilment of one or the other of the two following conditions:—(1) Conferring absolute powers of disposition upon the owner of the first beneficial particular estate, as is done by the Settled Land Act; or (2) Forbidding

the derivation of estates out of the fee simple, and reducing all particular estates to the position of mere equities or incumbrances. The proposal to allow the creation of particular estates, but not to allow them to be indicated upon the register except by way of *caveat*, is a clumsy and inchoate version of the second type, which has been rendered quite useless by the Settled Land Act.

Though the Act provides a new method whereby a man's land might possibly (by error or fraud) become indefeasibly vested in somebody else, without his receiving any notice of the change until he found himself evicted by the new owner, yet it makes no provision for the compensation of such possible sufferers, either by an insurance fund or at the public expense.

The evidence of Mr. McDonnell, above referred to (*supra*, pp. 30, 31), sufficiently shows that such a possibility is not merely imaginary.

If this feature of the system had been understood by the public it might, perhaps, have materially reduced the number of applications for registration under the Act. It does not appear, so far as the evidence goes, to have exercised any influence. Persons who heard that they were to acquire an indefeasible title to their own land, do not seem to have adverted to the fact that a new method was devised, by which an indefeasible title against themselves might, by possibility, be acquired by other persons.

Under the system established in the Australian Colonies, known as the Torrens System, and which is there very widely adopted, though its adoption is to a great extent voluntary, compensation to owners injured by the register is provided for by means of an insurance fund.

It will probably be the general opinion, that no

proposal to establish a compulsory system of registration, either in this country or elsewhere, ought to be entertained, unless it should contain adequate provision with regard to such compensation.

(6) The question of protecting unregistered interests applies, of course, only to such interests as admit of being injured, or destroyed, through the machinery provided by the register. There was no need to protect those interests to which an indefeasible title is declared to be subject, specified on p. 39, *supra*.

The Act protects unregistered interests by the entry upon the register of *caveats* or cautions, entitling the cautioner to previous notice of any intended dealing with the land.

Similar *caveats* may also be entered, with regard to unregistered land, entitling the cautioner to previous notice of any application to place the land upon the register.

The fact that there exists, on the part of the general public, an inveterate and almost universal disposition to omit to give even the most important notices of a change of address, must be seriously weighed in estimating the sufficiency of *caveats* as a protection. Moreover, even when the address is correctly known, the person might be temporarily absent; and such absences would, of course, be watched for by persons having fraudulent designs. Letters also admit, even though registered, of being fraudulently intercepted. A species of property which the owner must be perpetually on the watch to preserve, can hardly be regarded as a very eligible investment.

Lord Westbury's Act placed only the *minimum* of reliance upon *caveats*. But the alternative made the form of the register exceedingly cumbrous.

(7) Both under Lord Westbury's Act and the subsequent Act of 1875, the placing of a title upon the register is purely the voluntary act of the person or collective persons entitled to dispose of the fee.

But Lord Westbury's Act permitted a title upon the register to be withdrawn, with the consent of all persons interested. The Act of 1875 contained no such power, so that a title once placed upon the register under that Act must remain for ever subject to the provisions of the Act.

Failure of Lord Westbury's Act.

It appears by a paper, handed in 1878 by Mr. B. Spencer Follett, Q.C., the registrar, to Mr. Osborne Morgan's Committee, that in the fifteen years from 1863 to 1877 inclusive, the total number of titles registered was 410, representing a little over 47,000 acres. (Report, 1878, p. 183.) When we consider what proportion these numbers bear to the aggregate of the dealings with land during that period, it must appear that the failure of Lord Westbury's Act to secure the confidence and support of the public was almost complete.

The chief causes of this failure are indicated, with transparent clearness, by the following passages from the Report of 1870:—

"27. Mr. Jarrett gives the history of the registration of a property called 'the T. farm.' It was purchased, as before mentioned, by his partner, Mr. Farrer. The purchase-money was 2,900*l*. The title commenced in the year 1782. The contract to purchase was made on the 11th August, 1863. The purchase was completed on the 12th December in the same year. It was conducted in the ordinary way, the title being approved by a practising conveyancer. Mr. Farrer having completed his purchase, applied for registration on the 28th April, 1864. The registration was completed on the 23rd January, 1866. In the course of the proceedings it appeared that a legacy charged on the land in favour of a person who had died in 1847 was paid in 1860 (when it first became payable) to the legatee's sole next of kin, who, however, had not taken out administration to him. The point had been considered by the conveyancer, and waived on the purchaser's

behalf. The registrar required that administration should be taken out; and, as it was not done, entered a minute of that fact on the register. The net result of the case is, that a property passed under the vigilant eye of a skilled conveyancer from ordinary vendor to ordinary purchaser in the space of four months at a cost of 56*l.* 6*s.* 9*d.*; whereas the property immediately afterwards was registered in the space of nineteen months at the cost of 124*l.* 12*s.* 7*d.*,* the purchaser's own partners conducting the business; and after all a blot on the title, which the conveyancer, after having his attention called to it, disregarded, is stereotyped on the register." (Report, 1870, p. xviii.)

After examining certain witnesses, the Land Transfer Commission felt themselves in a position to frame a set of printed questions with a view to obtain information upon a larger scale than would have been possible by means of *vivâ voce* evidence. The first five of these questions were as follows:—

1. Have you been professionally engaged in placing titles on the register of the Office of Land Registry?
2. Will you state how many?
3. In how many cases have you completed the registration?
4. In how many cases have you failed to complete the registration, and for what reasons?
5. Is there more delay or difficulty in placing a title on the register than in proving it to the satisfaction of an ordinary purchaser?

With reference to the replies received to these questions, the Commissioners make the following remarks:—

"28. Messrs. Holcroft and Knocker say, in answer to question 5:—

'5. There can be no comparison. In the first case the registration occupied eleven months, and in the second case two and three quarter years, although we used every exertion in each to accelerate the matter, and both properties having been previously purchased by our clients, the investigation of the titles had passed through our own hands.'

29. Mr. Howlett says, in answer to questions 1, 2, 3, 4, and 5, as follows:—

'1, 2, 3, 4. The only case in which I have been concerned is the following:—I offered a considerable property for sale by auction, stipulating in the conditions that a 40 years' title should be sufficient. It was sold at the auction for 28,000*l.* No difficulty occurred, and the purchase was completed on the day appointed. The purchaser determined to register the title, and applied to me to aid his solicitors in registering, by supplying at his expense an abstract of the earlier twenty years' title. I did so, and aided and assisted in the registration by producing deeds and evidence, making declarations, seeing and giving explanations to the chief registrar, and so forth. My costs alone were over 200*l.*, and I believe the total cost of registering was not much under 1,000*l.* He has since told me he never expects to get any equivalent advantage for the outlay.

'5. There is undoubtedly much more delay and difficulty.'

30. We need not give any further extracts in this place. It is obvious that experiences such as the foregoing must deter prudent men from placing their titles on the register. Indeed, one of the witnesses says, with much point:—

'It appears to me rash, in the highest degree, when an owner possesses an undisputed title to property, to attempt to ascertain whether or no it be indisputable.'" (Report, 1870, p. xviii.)

A paper is printed in Appendix No. 9, at p. 108 of the same report, in which Mr. Follett and the Deputy Registrar, Mr. Robert H. Holt, make some observations upon the evidence given by Mr. Jarrett, and particularly upon the remarkable experience above stated relating to "the T. farm." They explain quite satisfactorily the causes of the delay, and successfully vindicate their office from any imagined charge of obstructiveness or inefficiency. They do not at all succeed (if that was their intention) in showing that, with ordinary care and skill on the part of the solicitors conducting registration proceedings, the process of registering a title under Lord Westbury's Act could be made in general either cheap or speedy.

* Of this sum, 12*l.* 7*s.* 3*d.* was the cost of enfranchising a small part of the property, which happened to be copyhold, and which, therefore, could not have been put upon the register without being previously enfranchised. This may fairly be counted among the costs of the registration; because, except for the purpose of registration, nobody desired the enfranchisement. But if we deduct the costs of enfranchisement, the costs of the registration proper are 112*l.* 5*s.* 4*d.*

Indeed, such a contention could not without absurdity even be raised. The Report of 1870 makes it evident that the universal experience points towards costliness and tediousness as the result of attempted registration. Whatever degree of care and skill was in fact displayed in these transactions must be taken, for this purpose, to be (at least) the ordinary degree of care and skill. If any higher degree of care and skill is required, this requirement alone would make the Act nugatory. It would be absurd for a proposed scheme to promise complete success, provided only that a certain degree of care and skill, which has been found in practice not to exist anywhere, should be found to exist in every solicitor's office.

The precautions adopted by the Registration Office were not only justifiable but such as could not have been neglected without the grossest dereliction of duty. The fact that some of them are often waived in practice by willing purchasers affords no reason why a dormant claim, as to which the purchaser is willing to "take his chance," should be arbitrarily abolished by a public official. It should be remembered that "waiving a requisition" means only, on the part of a purchaser, voluntarily choosing, for the sake of readily completing a purchase, to incur a given risk; whereas, on the part of the registrar, it may mean confiscating somebody else's legal rights.

It must also be borne in mind, that the great majority of purchasers are willing purchasers, often eager purchasers. Men do not enter into a contract merely for the purpose of trying the experiment, whether they will afterwards succeed in evading it. The desire to buy is commonly not less strong than the desire to sell. Under the influence of these motives many points are often accommodated between the parties, which could hardly with propriety be forcibly settled by the law, apart from their consent.

An application for registration with indefeasible title is not a mere application to effect a sale, in which the opposite party has a full right to waive any objection. It is an application to decide finally upon the possible rights of strangers to the

proceedings, who are not only unrepresented, but probably unaware of what is taking place. Nobody can question a purchaser's right to accept any title for what it is worth, relying upon the probability that dormant claims will continue to sleep. But it is quite possible to question the propriety of permitting a public officer arbitrarily to bar dormant claims, merely because he thinks it unlikely that they will be effectively prosecuted.

It will appear presently that Lord Cairns' Act adopted this policy: to what extent, and with what justification, will require some discussion.

Lord Cairns' Act.

(The Land Transfer Act, 1875, 38 & 39 Vict. c. 87.)

It appears from the return furnished by Mr. Follett to Mr. Osborne Morgan's Committee in 1878, that the business of the Registration Office under Lord Westbury's Act was, during the last three years of its operation, brought almost to a complete standstill.

Year.	No. of Titles Registered.	Acreage.
		A. R. P.
1873	7	286 2 10
1874	5	79 1 28
1875	4	31 1 29

A few titles were registered under that Act during the two next subsequent years; but in these cases the proceedings must have been commenced before the end of 1875, after which time no application for registration under Lord Westbury's Act could be entertained. (Land Transfer Act, 1875, s. 125.)

So early as 1868 a strong suspicion had begun to be felt

that the Act would fail to achieve much success in practice. In that year the Royal Commission above referred to was accordingly appointed to consider the working of the Act and the condition of the Middlesex Registry. The Commission consisted of twelve members; one of whom, Lord Westbury, took no part in the proceedings, and two others, Mr. Spencer Walpole and Lord Justice Giffard, abstained from signing the Report. Of the nine members by whom the Report was signed, no less than six presented separate *memoranda*, expressing their dissent from parts of it.

In the Appendix to the Report is printed a very remarkable criticism drawn up by the Incorporated Law Society in 1862, upon the Bill which subsequently became Lord Westbury's Act. It appears that the Bill was very badly drafted, and the looseness of its language is the subject of some bitterly sarcastic comments. The Society did not succeed in persuading Parliament to introduce any important alteration in the policy of the Bill. The main heads of their objections foreshadow its practical failure with considerable precision:—

"The Bill is open to objection on the following grounds:—

* * * * *

"Fifthly. The probability that, if passed into a law as it now stands, it would, as regards the registration of at least nine-tenths of the land of England, be a mere dead letter.

"Sixthly. The probability that, as regards the other tenth part, it would utterly fail to fulfil the promise of its preamble, in giving certainty to title, facilitating the proof thereof, and rendering the dealing with land more simple and economical." (Report, 1870, Appendix, p. 49.)

The recommendations of the Commission may thus be summed up*:—

(1) That the register should be confined to the absolute fee simple: (p. xxvii., para. 66.)

* This summary, which is collected from the body of the Report, is somewhat more full and complete than the "summary of recommendations" given by the Commissioners at p. xxxii.

(2) That particular estates and all partial interests (except beneficial leases for more than twenty-one years) should be protected by *caveats* or notices: (p. xxvii., para. 66.)

(3) That the entry on the register should not pass the legal estate, but only enable the person registered to deal with it by transfer for value: (*Ibid.*)

(4) That beneficial leases originally exceeding the term of twenty-one years should be treated as separate subjects of registration: (p. xxviii., para. 70.)

(5) That a representative (often described by the phrase "real representative") should be entered in the register in the place of a deceased registered owner. Such representative would have much the same power to deal with the fee, as an executor has to deal with chattel interests: (para. 73.)

(6) That short, or even mere possessory, titles should be capable of registration; such registration to be subject to the prior title: (para. 75.)

(7) That the registrar should be empowered to accept, for registration as indefeasible, titles, of the kind commonly called "good," though not technically "marketable": (p. xxix., para. 77.)

(8) That the registrar should be empowered to accept "imperfect" titles for conditional registration, the title so registered to become indefeasible upon the happening of specified events or the lapse of a specified time: (para. 78.)

(9) That the registrar (apparently) should be empowered to accept, without verification, a title which had been recently verified by "solicitors and conveyancers of a specified professional standing": (para. 79.)

(10) That the register should conclude nothing, as against neighbouring owners, with respect to boundaries: (para. 80.)

(11) That a title once registered should not be removed from the register: (p. xxxii., para. 93.)

(12) That provincial registries should be established: (p. xxxii., para. 93.)

The Commissioners also recommended that the existing registry should be kept in operation, for the benefit of such persons as might prefer it to the system proposed to be instituted: (para. 95.)

The recommendation that both the old and the new registry should be kept simultaneously in operation, was not adopted by the Act of 1875. In rejecting this recommendation, the legislature seem to have displayed a wise discretion. That inconvenience and risk of error must be involved in the simultaneous working, by the same officials, of two diverse and highly complex systems, seems evident. And the rejection of this proposal could not injuriously affect the working of the new scheme; of which, properly speaking, it formed no part.

While the Act of 1862 was allowed to remain in force, for the purpose of regulating the registry established under it, no further applications for registration were permitted to be entertained. Great facilities were given for the removal of titles from the old registry to the new, upon the application of the parties concerned.

Nearly all the other recommendations of the Royal Commissioners have been adopted, as far as circumstances would permit.

(I.) With regard to restricting the entry on the register to the ownership, or quasi-ownership, of the whole fee, regarded as a single entity, Lord Cairns' system stood in a position of great disadvantage previously to the passing of the Settled Land Act, 1882. Previously to that Act, there did not generally exist any person who, by the ordinary law and apart from powers conferred by the settlor, had power to dispose absolutely of the fee simple of a settled estate. In such cases, it was absolutely impossible to register either an owner of the fee, or a person having power to dispose of the

fee. The only possible course, in such a case, was to place on the register the name of some person, who had in fact no such estate or power as he was supposed to have, and to append a restrictive clause, prohibiting alienation by him until certain conditions had been fulfilled, in addition to obtaining certain consents. The general nature of these conditions would of course be, the coming into being of persons not *in esse*, and the attaining to majority of persons not *sui juris*.

In cases where several persons collectively could make a title, such as a tenant for life and a tenant in tail in immediate remainder, it was possible to permit the name of one to stand upon the register, accompanied by *caveats* against his alienation without the consent of the others. The same remark applies to cases where incumbrances existed. But the result of this plan was merely to remove from Lord Westbury's register a specified number of estates and interests, and to reproduce them in the shape of a number of specified persons whose consent to a transfer was necessary.

Thus it appears that the Act of 1875 could practically do nothing to facilitate the alienation of land in settlement. Its aim was necessarily restricted to facilitating transfer by making still simpler titles which were already simple.

This difficulty has been effectually solved by the Settled Land Act, 1882. It is believed now to be the practice of the Registration Office, where land is subject to an ordinary settlement, to place upon the register the name of the tenant for life within the meaning of the Act, with *caveats* only in favour of the trustees of the settlement for the purposes of the Act.

It would seem, if the above-mentioned practice is correct, that the provisions of the Settled Land Act, 1884, s. 5, might perhaps enable the names even of the trustees to be dispensed with, in cases where they have received a general notice from the tenant for life of his intention to exercise his statutory powers. But if this should be done, it would be necessary to provide for the payment of

the purchase-money into Court, on any sale made by the tenant for life.

(II.) The question of protecting interests other than that of the "registered owner" by means of *caveats*, has been already indicated. The question as to the sufficiency of the protection is a serious one. The Royal Commissioners express the following opinion:—"We think it pretty clear that a system of notices or stops, framed on the foregoing principles, would adequately secure the owners of unregistered interests against any improper dealings with them." (Report, 1870, p. xxxi., para. 90.) The contrary opinion of Mr. McDonnell has already been cited above (pp. 30, 31). The question may be left to the consideration of any man of business, having any experience of the habits of the general public, whether people in general do, or do not, punctually perform such duties as giving information of a change in their address to official departments; and, if they do not, whether any rapid improvement can hopefully be expected in their dilatory habits? The further question may be left to the consideration of the general public themselves, whether they think it reasonable and desirable that carelessness in this respect should expose a person to the risk of losing his property?

(III.) The Act adopts, so far perhaps as was possible, the suggestion, that registration should confer not the *legal estate*, but only a *power of alienation*. But the difficulties, above suggested in paragraph (I.), made it sometimes impossible to apply this suggestion to the first registration. An application for registration of freeholds with an absolute title may be made by the person (or collective persons) having, or capable of disposing of, or of acquiring, *for his own benefit*, the whole fee (sect. 5); and by sect. 68, a person holding land as trustee for sale, or otherwise having a power of selling, may either authorize a purchaser to make an application, or may himself apply to be registered. The first

registration vests in the applicant an estate in fee simple in the land, subject (1) to incumbrances; (2) to certain public or quasi-public rights, which are left unaffected by registration; and (3) apparently* to any equities and interests by which he may be bound, notwithstanding the fact that by hypothesis he is able to acquire or dispose of the fee simple *for his own benefit*. But when the first registration has been effected it would seem that the person subsequently placed on the register, upon a sale or settlement taking place, might be any person agreed upon between the parties interested; such person not necessarily having even a power of sale, except upon the fulfilment of specified conditions, and with the consent of other specified persons, whose rights are protected by *caveats* entered on the register.

(IV.) A separate register is kept for leases, the required term being shortened from the two lives or fifty years unexpired which were required by Lord Westbury's Act, to a single life or twenty-one years unexpired. (Sect. 11.)

Seventeen applications for registration had been made by leaseholders up to 23rd December, 1885.

(V.) The question of a "real representative" has been a good deal discussed; and the opinion seems to be commonly entertained, that such a change in the law would, in its general operation, and apart from the facilities afforded by it for practically working a system of registration, be by itself a great public benefit, and do much both to simplify titles and to facilitate transfer.

It may be doubted whether there are sufficient grounds for expecting any such result; though, with regard to the assistance likely to be afforded to the practical working of a registry, especially under any compulsory system, by a "real representative," in whom freeholds should vest as chattels

* Paragraph (3) of sect. 7 of the Act is obscure. It is difficult to reconcile its language with the provisions of sect. 5.

real now vest in an executor, the appointment of some such representative would be found almost indispensable.

In administering the personal estate of deceased persons, it frequently happens that a part of the proceedings is nearly identical with what would be the course of proceeding required, with respect to real estate, to place a new name upon the land registry. The executor, or administrator, is usually a person who is perfectly acquainted with the members of the family and their circumstances. In transferring registered stocks into the names of the persons duly entitled, he acts upon his own authority, but at his own peril, and subject to legal responsibility if he should be guilty of fraud or fall into error. Without the assistance of some such functionary, having the same private knowledge and the same legal capacity to dispose of the deceased person's lands, the registry officials would be compelled, upon every devolution by death, uselessly to repeat an appreciable part of the trouble and formalities which were necessary at the first registration.

It would hardly have been practicable, and certainly not desirable, in an Act designed merely to establish a voluntary system of registration, to introduce so considerable a change into the general law. But the constitution of a "real representative" would be an almost indispensable feature of any scheme for compulsory registration of titles; and also of any scheme for effecting an equal division of real estate, among children or next of kin, upon an intestacy.

(VI.) The Act permits the registration of mere possessory titles, such titles, when registered, being subject to all rights and claims prior to the registration. (Sect. 8.)

The effect of this seems to be very nearly to incorporate into the Act a plan for gradually forming a registry of indefeasible titles through the lapse of time and the operation of the Statutes of Limitation. It nearly resembles (except in being voluntary) certain proposals which have been made for the institution of a compulsory register of assurances, as a

preparatory step to forming a compulsory register of indefeasible titles.

(VII.) The Act (sect. 17, sub-s. 3) enacts, that if the registrar, upon the examination of any title, is of opinion *that the title is open to objection, but is nevertheless a title the holding under which will not be disturbed*, he may approve of it for registration as indefeasible; either absolutely, or subject to a reference to the Court.

The convenience of this enactment in facilitating the registration of titles is obvious; but this convenience is manifestly gained by giving power to an official to confiscate dormant rights without compensation, if he thinks them not likely to be prosecuted with effect. It has already been pointed out, that in this process there is nothing analogous to the consent of a willing purchaser to run the risk of a remotely possible or dormant claim. The fact that many purchasers are willing to incur some slight degree of risk, affords no reason why any dormant rights which may be involved should arbitrarily be confiscated, especially without compensation. But the opinion has already been expressed, that adequate compensation for injury done by the register should be an indispensable feature of any scheme of compulsory registration; and the admission of compensation would no doubt remove the main objection to the admission of imperfect titles.

(VIII.) The registrar is empowered to except from the registration, "any estate, right, or interest arising before a specified date, or arising under a specified instrument, or otherwise particularly described in the register."

(IX.) It would be difficult to approve of the suggestion that the registrar should be empowered to accept the extra-judicial opinion on a title of any legal practitioner, even of the highest "professional standing." The Royal Commissioners seem, in making this suggestion, to have entirely

lost sight of the difference between a voluntary contract and a judicial sentence having power to bar the rights of strangers to the proceedings. No doubt the proposal has a tendency to cheapen the process of registration. But a proposal to register titles without any examination at all would have a still stronger tendency in this direction.

The General Rules made under the Act, in providing that opinions of counsel, with requisitions and answers relating to the title, which may be in the control of the applicant, shall be left at the office with the application, appear to have done everything to afford the registrar assistance from extra-judicial advice and opinion which is consistent with prudence and safety. (Rule 8.)

(X.) It is provided that the description on the register "shall not be conclusive as to the boundaries or extent of the registered land." (Sect. 83, sub-s. 5.)

Two objections against the precise ascertainment of boundaries, for the purpose of registration, had appeared during the working of the Act of 1862:—(1) That, merely as a matter of survey, precision is difficult of attainment; and (2) that it frequently became necessary to effect a final settlement of disputed questions as to boundaries, which, if no registration had been impending, would have been allowed to linger on as mere disputed questions.

The completion of the cadastral survey, at 25·344 inches to a mile, would completely remove the former branch of the difficulty in country districts; and even in town districts, unless for exceedingly small holdings. (Report, 1878, p. 3, Nos. 49—52.)

The second point can only be regarded as another proof of the great anxiety of the promoters of the Act to construct, almost at any price, a facile system. The precise ascertainment of the thing, the title to which is registered, would be one great benefit to be conferred by a perfect register. The concession manifestly amounts to a sacrifice of efficiency for the sake of expediency. Under some circumstances, and

with an adequate object to be gained, such a sacrifice might be justifiable. In the present case, however, it is certain that no material advantage was gained in popularity by the Act.

In the evidence given by Mr. H. W. Elphinstone before Mr. O. Morgan's Committee, the following passage occurs:—

"I can say, both as a landowner and as a conveyancer, that the question of boundaries is of the very utmost importance. It appears to me that a title under Lord Cairns' Act, by which it is expressly declared that the owner is not responsible for the difference in the boundaries, is absolutely worthless. Without going into details, I may say I have a property which is agricultural, which will some day come into use for building. The question of boundaries has suddenly cropped up, and it is of the utmost importance to me and my neighbours." (Report, 1879, p. 22, No. 385.)

It is remarkable that the Act should contain another provision, of which the effect was probably not foreseen, which is calculated to exercise a highly inconvenient influence upon the question of boundaries. Sect. 21 enacts, that a title adverse to the title of the registered proprietor shall not be acquired by any length of possession. It is a not uncommon practice between neighbouring owners to rectify their boundaries by mere straightening of fences and the like measures, without any deed or written document to record the transaction, trusting to the Statutes of Limitation to perfect their mutual titles. In cases where either owner is a "registered proprietor," it will be necessary to record such alterations upon the register, in order that the neighbouring proprietor may obtain any title.

This provision seems to be mischievous, from its interference with a very convenient and laudable practice. It also seems to be opposed to the general policy of the law. It is possible that some such provision is a necessary feature in any system of registration; but it is otherwise difficult to see any reason why Statutes of Limitation should not run against a registered proprietor, in the same manner as against any other.

(XI.) In adopting the recommendation, that a title once placed upon the new register should not be withdrawn from it, Lord Cairns must rather have intended to introduce the thin edge of compulsion, than to offer a novel and attractive feature. Landowners who, having registered their titles under the old system, and found its operation unsatisfactory, were revolving in their minds the question of withdrawing their titles from the register, must have been startled by the prospect of a register from which no withdrawal is possible. (See, for examples, Report, 1879, p. 7, No. 108; p. 24, No. 428.) Nor is it conceivable that anybody could, under any circumstances, regard what is a mere incapacity as an advantage.

(XII.) The Act provides (sect. 118) that the Lord Chancellor, with the concurrence of the Treasury, may create District Registries for the registration of land within defined districts, and may appoint District Registrars and other officials. Subject to general rules, a District Registrar is to exercise the same powers as the Registrar, and there is the same right of appeal from his decisions.

There is no doubt that the principle of subdivision presents some great advantages, particularly in preventing personation, and in enabling local knowledge of titles to be utilised. Moreover, it is obvious that a single central office could not have coped with the business that would have been crowded upon it, if either Lord Westbury's Act or Lord Cairns' Act had attained to even a moderate degree of popularity. Nevertheless, the proposal is a very serious one. The fact that a functionary exists who has the arbitrary power, by writing something in a book, to deprive any landowner in the kingdom of his land, is a matter for grave reflection, whatever may be our confidence in the honesty and prudence of the particular functionary. But the powers lodged in the hands of District Registrars are so tremendous, that a wide extension of the system, under which they should be vested in every one of a numerous body of "barristers, solicitors or

certificated conveyancers of not less than ten years' standing," may arouse in some minds other feelings than unmixed satisfaction.* It must be remembered, that there is strong reason to believe that the attention of the ablest practitioners in fraud has never been directed to the capabilities afforded by a widely-spread system of registration; and that we cannot know what might be done in this direction until it has been tried.

The following information, which is contained in the evidence given by Mr. G. B. Gregory, M.P., before Mr. O. Morgan's Committee, in 1879, is interesting and worthy of notice. That gentleman stated, that he had only registered one title under the Act of 1875, which was the title to Serjeants' Inn, belonging to the "Society of Judges and Serjeants"; and that in this particular case peculiar circumstances existed to facilitate the registration, which are not applicable to all titles, inasmuch as a statutory title had been vested in the Society by a private Act of Parliament passed about thirty or forty years previously. But the most remarkable feature in the evidence is the fact, that in this case the registration was not effected with a view to the title at all, but simply with a view to preclude any purchaser at the sale, which was then intended and was shortly afterwards carried out, from raising any objection with regard to the power to give an effectual discharge for the purchase-money. And Mr. Gregory stated that, unless in a case where some such collateral object was to be gained, he should not advise a client to register his title. (Report, 1879, p. 27, Nos. 503—517.)

Failure of Lord Cairns' Act.

This Act will be seen, by the foregoing account, to have bid very highly for popular favour. For the sake of obtaining facility in its working, it abandoned no inconsiderable

* Assistant District Registrars may be of only five years' standing.

part of those cautious safeguards against fraud and error which had been adopted by its precursor of 1862, without making any provision for the compensation of persons who might suffer loss by its easy dealing. Nevertheless, it did not succeed in gaining even the slight degree of public notice which had attended Lord Westbury's Act at the commencement of its career. The following passage from the evidence given in 1878, by Mr. Follett, Q.C., the Registrar, before Mr. O. Morgan's Committee, shows the completeness of its failure :—

"4. I see by the return which you have furnished, that the total number of registrations granted under the Act of 1875, up to the last return, which was in February last [1878], is only 28; that is so, is it not?—No doubt that is correct.

"5. And only four of those were granted since July last [1877]?—I have no doubt that is correct.

"6. There have been no leasehold applications at all; that is so, is it not?—There have been none under either Act.

"7. The number of registrations under Lord Cairns' Act is considerably less, is it not, than the number of registrations, or the number of applications, under Lord Westbury's Act?—Yes. I have had a paper prepared which will give you the number of registrations in each year from the beginning of the office.

"8. There seems to have been about 100 more under Lord Westbury's Act; is that so?—Probably more. At one time, about 1864 or 1865, I was sanguine enough to think that the scheme was going to succeed; there were a number of applications, but they afterwards fell off." (Report, 1878, p. 1.)*

* The following statistics, showing the state of the registry up to 23rd December, 1885, may be found of some interest :—

Lord Cairns' Act came into operation on 1st January, 1876, after which date no further applications under Lord Westbury's Act were receivable. At that date 398 separate, or original, titles had been registered under Lord Westbury's Act; and a few further registrations, arising out of the completion of proceedings which had been pending when the registry under Lord Westbury's Act was closed, raised the number to 411. Many of these titles (especially on building estates) had been subdivided by means of partial sales, and the total number of titles, both original and derivative, under Lord Westbury's Act which stood upon the Register on 1st January, 1876, was about 1,700.

Titles to the number of 170 have been removed from the Register by the owners. On 23rd December, 1885, the total number of titles, both original and derivative, upon the Register under Lord Westbury's Act, was 2,673.

The number of separate or original titles standing on the Register under Lord Cairns' Act, on 23rd December, 1885, was 113, of which seventeen were leasehold. Derivative titles, arising from subdivision, had at that date increased the total number to 308.

This result seems mainly to be attributable to the following causes :—

(1) The new registry practically did nothing at all to remove the main objection, which experience had shown to be fatal to the old one :—viz., that it inevitably saddles a landowner with very appreciable additional expense, and (if a purchaser) with a still greater disadvantage in the way of delay in completing his purchase, for the sake of obtaining an advantage which, even if of undoubted value in itself, offers only a remote and uncertain advantage to the person himself, at whose cost it is to be obtained. An Act may easily introduce into its practice a dangerous laxity of procedure, but no degree of laxity which could be regarded as tolerable could possibly have effected the object aimed at. If such provisions are administered with prudence and discretion, they leave the procedure, so far as the present point is concerned, practically unaltered. Some reduction may be effected in the necessary expenses; but the practical effect, for this purpose, of a mere reduction, is inconsiderable. (See and consider Report, 1879, p. 191, Nos. 357—365.)

(2) The new registry practically did nothing to remove the second main objection, namely, the great reluc-

tance of landowners to enter upon any investigation of their titles, which is not forced upon them by some contemplated dealing with the land. If the title is perfect, it means incurring a gratuitous expense: if the title is imperfect, it means paying money for the sake of slandering your own title. The efforts made by the Act to offer easier terms of proof, tend of course in what may be styled the "right direction;" but practically they could have no great effect.

(3) It is not impossible that the previous failure of the Act of 1862 exercised a pernicious effect upon the prospects of the Act of 1875. This seems to be regarded by Sir Henry Thring as the principal cause of the later Act's failure.* No doubt, the effect of a previous failure is rather to discourage than the reverse; but there is little reason to suppose that, if Lord Cairns' Act had been passed in 1862, it would have had any materially greater success than Lord Westbury's.

(4) With regard to the prospective advantages offered by the Act, it is not easy to say how these are to be realised by ordinary persons. In special cases, where some collateral object is to be gained, as in the case of Serjeants' Inn above referred to, the advantage is obvious. But in ordinary cases it is not obvious that registration of his title would be much to the profit of the landowner, even in conducting future sales and mortgages; unless he

* "First of all, I consider that the passing of Lord Westbury's Act, which, in my opinion, was entirely unworkable, threw a blight on the whole thing. Supposing you attempt to set up a system in England, and it does not succeed at first, it is a long time before you can again set it up." (Report, 1879, p. 1, No. 7.)

should feel competent to conduct these transactions without legal assistance. Recent legislation has greatly strengthened these considerations. Under the Solicitors' Remuneration Act, 1881, the remuneration of the solicitor is calculated upon an *ad valorem* scale, which would not be diminished merely by registration. The net result seems therefore to be, that the solicitor might perhaps have less to do, but would have a right to the same payment for doing it.

(5) The existing system of conveyancing is by no means such as to exercise any strong pressure upon purchasers and mortgagees to have recourse to the registry. It will presently appear, by the strongest evidence, that the safety afforded by the ordinary practice is, to purchasers upon sales, absolutely perfect; and that even as regards mortgagees, losses through deliberate fraud are rare, their losses being chiefly caused by what have been styled the "iniquitous doctrines of the Court of Equity" relating to "tacking," and "consolidation of mortgages." (Report, 1879, p. 45, No. 853.) With regard to the question of costs, in the absence of a special bargain made with his solicitor, registration might perhaps lessen the solicitor's trouble, but it has not *ipso facto* any tendency materially to lessen his bill of costs. Nor does it seem probable that any system could be devised, under which the aid of a legal adviser, in any but exceptional cases, could be dispensed with. Even Consols are not transferred by the owner alone, but with the aid of his broker.

(6) It is not improbable that some of the changes introduced by Lord Cairns' Act, especially the impossibility of removing a title from the new register,

had an adverse effect upon its popularity; and that if the recommendation of the Commissioners of 1868, that both registries should be kept on foot, had been adopted, the remarkable result would have followed, that the applications under the old system would not have been less numerous than those under the new one.

Lord Cairns' Act has some defects, the judicious removal of which might, perhaps, effect some theoretical improvement in its system. But it is not probable that, by any changes in detail, the system could be brought into general favour or use.

Scotland.

The real property law of Scotland, and the practice of conveyancing there in use, are so widely different from the law and practice of England, that it is doubtful how far any illustration drawn from the one country is serviceable for application to the other.

The system of registration established in Scotland is a system of inrolment of assurances. The whole deed, or the material part of it, is engrossed at length in the register. (Report, 1879, p. 74, No. 1410.)

The inrolment does not itself make the title, but only perfects, and protects, the title given by the deed. (*Ibid.* No. 1400.) Registration is necessary in order to secure priority.

Since 1868, there has been a single Central Registry for the whole country, except the "old royalties" of the Royal Burghs, which form only a small area. Previously to that time, a deed might be registered either locally in the district, or in the Central Office; whence it happened that a double search was generally necessary. Double search is still necessary when the search is carried back beyond 1868. (*Ibid.* p. 78, No. 1503.)

At the present Central Office the index is kept topographically, having separate divisions for each county, and for one or two minor districts. The register appears to be most carefully kept, and the system of combining all the particulars relating to each separate property or lot into a single sheet, called the "search sheet," affords peculiar facility for investigation. (Report, 1879, p. 76, Nos. 1446—1450.)

The following passage from the evidence given by Mr. John Clerk Brodie, Keeper of the Register of Sasines in Edinburgh, in 1879, before Mr. O. Morgan's Committee, states in detail the proceedings observed in the Edinburgh office:—

"1542. Will you explain exactly the process of registration of deeds in Scotland?—When a deed is given in for registration it is, in the first place, entered in what is called the Presentment Book, which contains the day on which it is presented, and the hour; as, for instance, between 10 and 11, 11 and 12, or 12 and 1; then they enter the disposition, or bond, or discharge, or whatever may be the nature of the writ; the name of the person, either the disponer or disponee, it matters not which, or the person granting the bond, is also entered; and the name of the person who gives it in for registration is signed to the entry; that forms the entry in the presentment book.

"1543. Does that presentment book determine the date of priority? No. What determines the date of priority is the minute book, but the minute book re-echoes the presentment book; the presentment book is not a statutory book though an official book. Then, when the document has been so entered in the presentment book, it is put into the hands of one of the superior clerks for the purpose of making a minute of it. I have already described what that minute is; it sets forth all that is material in the deed, including the date of presentation, which is of vital importance, as upon it depends the priority to other deeds.

"1544. May I take it that a deed ranks in priority according to the moment at which it is presented?—That is so, because the time at which it is presented is, in law, the date of its registration.

"1545. The registration relates back to the presentment?—Yes. The minute that is made contains a statement of what the deed is, whether a disposition, a bond, or a discharge, or other deed: it contains the name of the grantor and grantee; it contains a short abstract of the lands, including every name of land that is in the deed; it contains the date of the deed and the name of the person presenting it;

and if the deed be one that proceeds upon other deeds it sets out those other deeds; in short, it is a very full abstract.

"1546. What is the next process?—The minute having been drafted and revised is engrossed in the minute book and signed; and then the deed is put into the hands of another clerk to be engrossed in the record, and it is engrossed *in extenso*." (Report, 1879, p. 80, Nos. 1542—1546.)

Probably the system owes much of its success to the exceeding shortness of Scotch deeds; and also to the fact, that dealings with land are by no means so common in Scotland as in England. More deeds are registered annually in the Middlesex Registry alone, which does not include the City of London, than in the Edinburgh Registry for the whole of Scotland.

It is also to be remembered, that in Scotland the practice of making an equitable mortgage by deposit of title deeds is unknown. (Report, 1879, p. 87, No. 1708.)

Part III.

Schemes and Prospects of Remedial Legislation.

It is believed that registration in some form or another enters into nearly every scheme which has recently been advocated for the "reform of the land laws." It will be found that two distinct ideas run through the principal arguments advanced in favour of such schemes:—(1) How to afford perfect security to mortgagees, by means of publicity; and (2) How to reduce to a minimum the average costs of conveyances and mortgages. The former of these ideas implies some provision for the registration of mortgages; and the opinion, that titles to land might advantageously be assimilated to the model afforded by the registers of Government stocks or of British ships, has brought various schemes for the registration of titles (including the registration of deeds, with a view to a future registration of titles) into great prominence in connection with the present subject.

Some examination will now be made of the principal characteristics of both these kinds of registration, and of what appear to be the principal conditions to be fulfilled by any proposed scheme, in order that it may deserve the approval of the legislature and the public.

Schemes for enforcing the general registration of titles commonly comprise among their details the institution of a register of incumbrances. A perfect register of titles would therefore afford, among other advantages, all the advantage which could be gained by the mere registration of mortgages.

But the larger scheme is attended by many difficulties of a formidable character, from which the lesser scheme is in a great measure free.

The proposal to establish a register of mortgages starts with this advantage, that the thing has been tried in England under existing conditions, and experience has shown that it could be made to effect its proposed object, if the public are willing, for the sake of the advantage to be gained, to make the necessary outlay. Whether this advantage might not be bought too dearly, is another question. The result might possibly show, that the increase in security is too slight to be worth the additional cost and trouble; for it must be remembered that the force of one principal argument in favour of establishing a register of mortgages depends very much upon the question of fact, whether frauds upon mortgagees are common under the existing practice.

As the question of the degree of security offered by the existing practice has often been raised in discussion, and very erroneous opinions have sometimes been expressed, it seems appropriate to offer some remarks upon the subject.

In considering the question of the degree of security afforded by the existing practice, it is necessary to distinguish between three different things, which have been often confused together:—

(1.) The safety of purchasers upon absolute sales;
(2.) The safety of mortgagees, so far as regards the goodness of their title;
(3.) Losses which may be incurred by mortgagees, notwithstanding the goodness of their title, through the operation of the equitable doctrines of "tacking" and "consolidation" of mortgages.

(1.) With regard to the safety of purchasers upon absolute sales, the existing system of conveyancing, so far as mere safety is concerned, approaches as nearly to perfection as

any system which ever has existed in any country. The voluminous evidence appended to the various Parliamentary Reports above referred to, shows that witnesses, with the widest experience of the relevant facts, were unable to specify any example which had ever occurred to them in business, of a purchaser upon an absolute sale who had been evicted by reason of a concealed flaw in his title.

Mr. W. Barber, Q.C., in his evidence before Mr. O. Morgan's Committee, observes:—

"In the course of a very large experience, I cannot at this moment recall a single instance where, on a purchase and sale transaction, the purchaser has been ousted because of a fraud in the execution of a deed." (Report, 1879, p. 45, No. 853.)

Mr. Dees, a solicitor having an extensive conveyancing business at Newcastle-upon-Tyne, comprising small transactions equally with great, observes:—

"I cannot for the moment remember any case where a solicitor has accepted a title which has turned out to be bad; of course there must be such cases." (*Ibid.* p. 43, No. 812.)

Mr. Bateson Wood, sometime President of the Manchester Law Association, and conducting a large conveyancing business at Manchester, also comprising both small and large transactions, gave the following evidence:—

"1022. How do you account for the failure of the Act [of 1875] in your locality?—In the first place, at Manchester we do not labour under that sense of insecurity of titles which seems to have been the main thing that led to the Act being passed; during a long series of years we have had titles regularly passing before us, and we have not experienced any inconvenience or any bad titles for a long period." (*Ibid.* p. 56, No. 1022.)

Mr. William Ford, of the firm of Ford and Longbourne, Gray's Inn, stated, in reply to one of the questions put by the Commissioners of 1868:—

"It is a delusion to suppose that a registered estate would command

a higher price, except, perhaps, in very small transactions. It so rarely happens that bad titles are foisted on to purchasers, that no one would pay more to be freed from a risk which is practically inappreciable." (Report, 1870, p. 65.)

Mr. E. W. Rowcliffe, of the firm of Gregory, Rowcliffe, and Rawle, stated to the same Commissioners:—

"I have never known a purchaser lose his property, or suffer any loss from a concealed incumbrance or liability on account of the shortness of the title which he had taken. Indeed, I may say that during nearly 25 years of litigated business, arising in all parts of England, I have never known a purchaser lose his property from any unknown defect of title. I have known cases in which purchasers have been ejected; but the defect has been known and guarded against, either by absolute covenants or deeds of indemnity." (*Ibid.* p. 63.)

When the existence of a flaw is admitted, and the purchaser, in order to complete the transaction, consents to waive his objection, and "take his chance," the proceeding has, of course, no resemblance to palming off a bad title upon an unsuspecting purchaser. These avowed flaws represent those "dormant claims," which the Registrar now has a discretionary power to bar; and the last-cited evidence lends great force to the remarks made above upon this subject (pp. 46, 55).

Some expressions may be found in the Report of the Royal Commissioners of 1854, which may be taken to indicate the opinion, (1) that the present system of conveyancing is peculiarly insecure in its transactions; and (2) that a sense of this insecurity produces a wide-spread feeling of apprehension, sufficient to exercise a deterrent effect upon sales and purchases of land. At p. 6 of their Report, the following remarks occur:—

"1. There being no registry of deeds or of ownership, fraudulent titles may be made by the suppression or destruction of title deeds.

"2. There is consequently a general insecurity of title and apprehension of risk, even when, to all external appearances, there is an absence of any ground for suspicion."

If these expressions were intended to bear the meaning above attributed to them, they seem to be too much opposed to general experience to require any further refutation.

It is particularly noteworthy that the same Commissioners, in another passage of their Report, themselves expressly contradict their own opinion given in the previously cited passage. When they come to advocate the parliamentary warranty of registered titles, they observe:—

"If the title is investigated with ordinary care, as no doubt it would be by the counsel and solicitors selected for that purpose, the risk run is more nominal than real." (Report, 1857, p. 45.)

The Commissioners would seem to have confused together two very different things—carefulness and timidity. It is true that, under the existing system, titles are, and long have been, investigated with great care; and with this result, that the proportion of unsound to sound titles is very small, and that both purchasers and mortgagees may feel a confident security, upon being advised by a competent conveyancer, that a proffered title is such as may safely be accepted.

Two of the principal precautions against the fraudulent registration of titles consist in affidavits made by applicants, and official inquiries made upon the spot. The strength of a chain is dependent upon its weakest link, and the adequacy of these precautions depends upon the trustworthiness of the persons by whom these inquiries are conducted. Under any system of compulsory registration of title, these inquiries would be very numerous, and would require a very large staff of perambulatory officials. Unless each of these officials should be *suspicione major*, a new mine of fraud would be opened, which is not at all likely to be left unworked.

Forgery of titles to real property does not now present the same facilities and temptations as forgery of titles to stocks and shares; both because in the latter case the title is easier to forge, and also because the market value of the forged title

is immediately received in the shape of money; whereas, in the case of real estate, the mere mechanical difficulty of the forgery is much greater, and it is generally necessary to transfer the forged title, by a separate transaction, to a purchaser for value without notice, before the forger can acquire for himself any pecuniary advantage. These considerations explain the fact, that "stock frauds" are at present much more common than "land frauds." They afford no ground for supposing that a registry of titles to land would give greater security against fraud than the present system of conveyancing.

(2.) With regard to frauds upon mortgagees effected by means of forged or suppressed titles and deeds, these are undoubtedly more common than similar frauds upon absolute purchasers. But, under the existing practice, such frauds upon mortgagees are by no means so common as is often assumed to be the case.

This conclusion is proved partly by such evidence as that of the above-cited witnesses, and partly by the fact that, whenever the subject is discussed, the same few examples are almost invariably adduced. Of these, the Roupell frauds depended upon the prior forgery of a will: an offence which no system of registration would have prevented. And it is remarkable that the Dimsdale frauds were effected by means of forged leases: the only kind of title *consisting of a single document* which could occur under the present practice, without attracting a more than ordinary keenness of scrutiny.

It is certain that the roll of mercantile frauds, including forged transfers of stock, is vastly more prolific than the roll of land frauds, whether upon purchasers or mortgagees. The following information is not very commonly known, but is very worthy of notice. The Bank of England is liable for losses incurred through fraudulent transfers of the government stocks registered in its books; and it appears from the Report presented in 1832 by the Committee of Secrecy on the Bank of England Charter,

Appendix No. 63, that the losses of the Bank by this means in the ten years from 1822 to 1831 inclusive, amounted to a total of 402,040*l.*, giving a yearly average loss during those years of more than 40,000*l.*

It is to be noted, that a register of mortgages, apart from the title of the mortgagees, could not offer any new facility for the perpetration of fraud, while a register of titles possibly might do so. Registration of deeds being a mere condition precedent to the assertion of an independent title, which derives from the registration no extraneous validity, cannot have any tendency to promote fraud.* This remark does not hold good with respect to the registration of titles, where something extraneous to the precedent title is gained by the registration.

Sir Robert Torrens in his evidence before Mr. O. Morgan's Committee, laid stress upon what he considered to be "quite a new set of frauds, that do not take place except where there is registration of deeds;" and he specified certain examples within his own knowledge. In one of these cases a purchaser, who neglected for "a few days" to register his purchase deed, lost his purchase by the intermediate registration of another deed. (Report, 1878, p. 143, Nos. 3068—3077.) The statement is perhaps not quite fair, that in this way registration of deeds opens the door to a new class of frauds. The danger, which Sir R. Torrens appears to have much exaggerated, has easily been avoided

* It is true that serious inconvenience might be caused by the malicious insertion of fraudulent memorials of charges upon the register. But there is little temptation to commit this offence, which would be severely punishable, and which offers no clear prospect of pecuniary gain; and the chance of its occurrence may probably be neglected in practice. Mr. W. Pickard, Deputy Registrar for the West Riding, states in evidence that in the course of thirty-seven years' official experience, he had not met even with a single attempt. (Report, 1878, p. 134, No. 2884.) Fraudulent entries in a register of titles, if successful, do much more damage, and they offer a much more serious temptation.

by the recent Yorkshire Acts; which provide that notice of an intended registration may be given by way of *caveat*, to continue in force only for a limited time, and that any subsequent registration in pursuance of the *caveat* shall relate back, in point of time, to the date of the *caveat*.

(3.) With regard to the losses incurred by mortgagees through the occasional operation of the equitable doctrines of "tacking" and "consolidation" of mortgages, there can be no doubt that such losses are much more frequent than losses incurred through express or actual fraud.

The operation of those doctrines tends greatly to increase the danger of having any dealings with equities of redemption. The result follows, either that equities of redemption must be unmarketable as property and securities, or else that dealers in such property must run a certain risk, which will sometimes involve them in serious loss, without their having precisely done anything which can be called "their own fault." They knew, of course, or ought to have known, that the rule of law may possibly do them an injury; but sometimes the injury may be of a kind against which no foresight could have guarded, except by inducing them to abstain altogether from meddling with such transactions.

Tacking.

Before the Judicature Acts, when the law and equity were administered in separate Courts, equity did not interfere with any legal title unless the person having it had done something to disqualify himself from relying upon it. Therefore if there were two incumbrancers, both equally innocent, one of whom had the legal estate while the other had not, the claim of the one having the legal estate, even though of later origin, was allowed to prevail over the claim of the other, though of earlier origin. The reason of this was, that the title of the one having the legal estate would have been enforced without hesitation by the Courts of Law; and the mere fact that somebody else had a prior equitable claim gave him no reasonable ground of complaint against the legal tenant, unless he could assert that the legal tenant had known of the prior equitable claim when he took his own security. Hence the equitable rule: "Where equities are equal, the legal title shall prevail."

The combined administration of law and equity in a single Court does not affect the ultimate rights of the parties, and the owner of the legal estate is still entitled to any advantage which he might previously have claimed in a Court of Equity.

The doctrine of tacking, which depends upon the foregoing considerations, is best illustrated by an example of its ordinary operation. Suppose there are three mortgagees, the first having the legal estate, and that the third, *when he took his security*, was ignorant of the existence of the second. If the third mortgagee should obtain a transfer to himself of the first mortgage accompanied by the legal estate, he will be entitled, by virtue of having the legal estate, to demand that both of the securities in his hands shall be satisfied, before the second incumbrancer can claim anything. Thus a transfer of the legal estate may practically cause a second mortgage to rank after a third. If (as often happens in such cases), the property is not sufficient to satisfy all the claims upon it, the second incumbrancer must bear the loss, without having committed any fault beyond having dealt in an equity of redemption.

An attempt was made to abolish "tacking" by the Vendor and Purchaser Act, 1874, s. 7, which enacted that in future no priority or protection should be given to any interest in land by reason of such interest being protected by or tacked to any legal estate. But this enactment went beyond the mischief aimed at, and the result was found to be intolerably inconvenient in practice. Instead of doing any good, the enactment merely made legal mortgages not less dangerous than mortgages of an equity of redemption, and it was no longer possible for a first mortgagee, though having no notice of any subsequent incumbrance, safely to make

further advances to his mortgagor. In 1875, the enactment was repealed "as from the date at which it came into operation," by the Land Transfer Act, s. 129; and no attempt has since been made by the legislature to deal generally with the doctrine of tacking.

The establishment of a general register of mortgages would make it comparatively easy to abolish tacking. As above mentioned, tacking is expressly abolished by the Yorkshire Registries Act, 1884, s. 16; and this provision seems to remain in force and effectual, notwithstanding the repeal, by the Yorkshire Registries Amendment Act, 1885, s. 5, of sect. 15 of the prior Act, which made the entry on the register notice to all the world.

But even under this system of registration the abolition of tacking, as above mentioned, is not unattended by practical inconvenience. It hinders mortgagees from making further advances, and bankers from allowing overdrafts upon a general mortgage to secure the balance of an account current, by obliging them to search the register anew before each advance or draft is allowed.

Consolidation.

At law, when the day of redemption named in a mortgage had expired, the right of redemption was absolutely gone. Thenceforward, the mortgagor enjoyed the right of redemption only as a favour allowed by equity; and Courts of Equity made it a condition of granting this favour, that the mortgagor should (if required so to do) simultaneously redeem any other mortgages over any other parts of his property which might be in the hands of the mortgagee against whom redemption was prayed. It is accordingly said, that a mortgagee may "consolidate" all mortgages in his hands made by the same mortgagor, as against the mortgagor and his representatives in title.

In simple cases, such as the foregoing, the doctrine operates not unfairly. Of several properties belonging to the same

mortgagor, some may be mortgaged to the same mortgagee for more than their full value, and others for less. In such a case, if equity had permitted the mortgagor to pick and choose, the mortgagee would have suffered loss through being deprived of his strict legal rights.

The inconvenience of the doctrine arises from its extension to persons deriving title under the mortgagor as well as to the mortgagor himself. This could not easily have been avoided; for otherwise a mortgagor might have injured his mortgagee by selling the equity of redemption to a stranger. The result makes it dangerous to purchase an equity of redemption; because the purchaser may find himself obliged to redeem other properties besides that comprised in his purchase.

Some check was given to the doctrine by the decision of the House of Lords in the case of *Jennings* v. *Jordan*, 6 App. Cas. 698, where it was held that the assignee of an equity of redemption could not be compelled to redeem incumbrances created subsequently to the assignment.*

Though the doctrine of consolidation may sometimes protect a mortgagee from unforeseen loss, there is nothing in the doctrine to make it an essential feature in the existing practice. It seems probable that the public convenience would be promoted by its total abolition, whereby each individual mortgage would be kept separate from every other similar transaction.

The Conveyancing Act of 1881, s. 17, prevents the con-

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* The reverse had previously been held, by the Chancery Court of Appeal, in *Tassell* v. *Smith*, 2 De G. & J. 713. In *Jennings* v. *Jordan*, the decision of Vice-Chancellor Sir W. Page Wood in *Beevor* v. *Luck*, L. R. 4 Eq. 537, was much questioned by Lords Selborne and Blackburn; and it was subsequently not followed by Mr. Justice Fry, in *Harter* v. *Colman*, 19 Ch. D. 630. It is perhaps to be anticipated that in future a mortgagee will not, as against the assignee of an equity of redemption, be permitted to consolidate other mortgages which he may have acquired subsequently to the assignment of the equity of redemption.

solidation of mortgages made after the commencement of the Act, except where one of the mortgages sought to be consolidated contains a provision to exclude the Act's operation. It is doubtful whether this enactment has done very much to remove consolidation from the current practice, because provisions to exclude the Act are easily framed and inserted, and in the majority of mortgage transactions the mortgagee has a preponderating voice with respect to minor details. There is reason to suppose that the enactment is not often allowed to take effect, except in the comparatively few cases where the mortgagor has the predominating voice, or where special circumstances make it unusually improbable that a case of consolidation will arise.

The doctrine is one which mortgagees would never have invented for themselves; but since it has been invented for them by the Court of Chancery, they will not easily be persuaded voluntarily to relinquish it. By the last-cited enactment, during one stage of its progress through Parliament, it was proposed to make the abolition of the doctrine complete and compulsory; but it was altered to its present shape owing to a doubt whether the parties to a mortgage could possibly be prevented from introducing the doctrine in the shape of an express contract.

It may, however, be suggested that to frame such express contracts would be no very easy task; and that the doctrine is not practically so very attractive as to induce mortgagees to insist with extraordinary obstinacy upon retaining it. If the retention, which is at present exceedingly easy, could be made difficult, the doctrine might possibly drop out of notice. Moreover, there are cases in which the doctrine, though affecting the rights of third parties, may be allowed to take effect as a rule of law, in which it would certainly not be allowed to take effect as a mere contract between the parties.

Registration of Mortgages.

Mr. W. Barber, Q.C., in his evidence before Mr. O. Morgan's Committee in 1879, briefly sketched a plan both for

amending the law of mortgage and for establishing a register of mortgages, which appears to offer to mortgagees complete security, so far as that can be attained by publicity.

The cardinal features of this scheme are:—

(1) The abolition of tacking and consolidation.
(2) Forbidding any conveyance of the legal estate to be made by way of mortgage only.
(3) Annexing by statute to every mortgage the usual power of sale, and other powers and provisions commonly inserted in mortgages, so as to supersede their express insertion.
(4) Registration, priority to be absolutely determined by the place on the register.
(5) That the experiment should at first be tried over a limited area.

The absolute prohibition of conveyances of the legal estate by way of mortgage might lead to attempts at evasion, by making absolute conveyances accompanied by separate defeasances; and if such transactions should be declared void, this would introduce a new and dangerous element of insecurity and complexity into titles. But if the other suggestions of the scheme should be carried out, they would deprive the possession of the legal estate of its importance to mortgagees, and the practice of making conveyances of the legal estate by way of mortgage might perhaps be voluntarily abandoned.

The suggestion about implied powers has been carried into effect by sects. 18—24 inclusive, of the Conveyancing Act of 1881.

It is not impossible that by a judicious amendment and extension of sects. 26—29 of the same Act, which relate to "statutory mortgages," shortness and simplicity in forms of mortgage might be made compatible with perfect efficiency and perfect safety.

It might thus be possible, by introducing a very simple

form of conveyancing into mortgage transactions, to effect a saving more than sufficient to defray the costs of registration. But there seems to be little ground to expect that ordinary persons will (at least for many years to come) be capable of conducting even the simplest mortgage transactions without professional assistance.

It would therefore become necessary, if this branch of conveyancing should be made exceedingly simple and easy, to remodel the present scale of professional charges. So long as the solicitor is paid upon the present *ad valorem* scale, the client will hardly reap any advantage from the proposed reforms.

The following features and incidents of every such scheme will require careful consideration :—

(1) Some addition would be made by its adoption to the expenses of every mortgage transaction. It is no reply to this objection to urge, that, by devising simpler forms of mortgage, a sufficient margin might be saved to cover this additional expense; because the adoption of the scheme does not make it easier to invent simple forms of mortgage, and there is no necessity to expend any part of the money thereby saved, in setting up or maintaining a collateral system of registration.

(2) If the practice with regard to mortgage transactions should be made much simpler than at present, some revision of the present system of remunerating solicitors would become necessary.

(3) The abolition of "tacking" could not be enforced, without seriously impeding many mortgage transactions which are now of common occurrence. Such a course could hardly be justified, except upon the assumption that such transactions are immoral and ought to be actively discouraged by the legislature.

The last remark applies also to the next-following paragraph.

(4) To permit equitable mortgages to be effected by mere deposit of deeds would greatly impair the efficiency of the register, while to forbid such transactions would give rise to a certain amount of practical inconvenience.

Thus it appears that the question of establishing a register of mortgages must depend upon a balance of advantage and disadvantage. On the one hand, a perfectly stringent system of registration would afford absolute protection against certain forms of express fraud. On the other hand, it would add something to costs, and would hamper bankers and others in allowing overdrafts and making "further advances," and in accepting equitable mortgages.

Registration of Titles.

It can hardly be denied that any proposal to force registration of title upon landowners demands serious attention. The object of the following remarks is not to advocate any particular course, but only to inform the public and the profession. It is not proposed to enter minutely into details, but to examine in outline the various proposals which have been brought before the public notice, with a view to ascertain the conditions which need to be fulfilled by any proposed scheme, in order that it may deserve either success or approval.

The experience afforded by the failure of the attempts which have hitherto been made in England to induce landowners voluntarily to accept registration of title, is enough to show that the introduction of compulsory registration

would be an undertaking of no ordinary difficulty; and, perhaps, for a politician, of no ordinary risk. Lord Westbury's Act was passed in 1862 after about eight years of the most laborious inquiry and preparation. When its failure had become manifest, a hope was entertained, that by inquiring into the causes of this failure, and judiciously adapting the details of the system to meet them, a successful Act might at length be framed. Nevertheless, Lord Cairns' Act of 1875 failed more conspicuously, if possible, than its precursor of 1862. The evidence given before the Royal Commissioners of 1868 and Mr. O. Morgan's Committee, completely disposes of all such explanations as "the hostility of solicitors." The people who had tried registration of titles state very clearly, that it had caused serious expense and inconvenience, without doing any appreciable good in return. There can be no doubt that, if either the Act of 1862 or the Act of 1875 had been made compulsory, it would have proved to be an intolerable public nuisance; that it would have effected an almost complete obstruction of business; that it would have provoked a formidable burst of rage and indignation; and that it would have been repealed in the very next session of Parliament.

The proposal has been made, that every title shall compulsorily be placed upon the register at the next change of ownership, whether such change be an absolute transfer or a mortgage in fee. (Report, 1878, p. 42, No. 776.) Such a proposal will be lightly entertained only by those who are ignorant of the immense number of the dealings with land which annually occur in England: a number which, in proportion to the acreage, probably much exceeds the number occurring in any other country in the world. It appears by a Return printed at p. 179 of the Report of 1879 of Mr. O. Morgan's Committee, that in the week commencing 5th May, 1879, no less than 810 documents were registered in the Middlesex Registry alone, which is exclusive of the City of London. This suggests a total aggregate of about

40,000 per annum.* This number includes leases, and other transactions which would not involve placing the title upon the register. But after making every deduction, the conclusion seems to follow, that it would require an immense staff of officials of all grades, to cope with the amount of work which might with probability be expected to flow in upon the office from the whole of England.

It must, therefore, be observed at the outset, that, if compulsory registration is to be established, some wide departure must at all events be made from the system of Lord Cairns; which, so far as regards the practical impossibility of adapting it to the existing state of English titles, is identical with the system of Lord Westbury.

The opinion seems to be entertained in some quarters, that all difficulties could be overcome by establishing a special Court upon the model of the Irish Landed Estates Court. No doubt the existence of such a Court would very favourably affect the examination of titles; and perhaps it ought to form a part of any compulsory scheme. But such a Court could do nothing to remove the great stumbling-block of costs, which proved fatal to the former Acts, compulsory subjection to which would certainly provoke very great discontent. It would be of little use to set up the Irish Court in a country where the circumstances do not exist which caused its jurisdiction to be generally regarded as a blessing. Creditors who could not get their debtors' estates realized without having recourse to the Court, might be expected to pay the resulting costs without grumbling; but this remark does not apply to English landowners, who would be driven into Court against their will by the letter of an Act of Parliament.

* The number registered in 1878, at Edinburgh, for the whole of Scotland, was about 31,000. (Report, 1879, p. 79, No. 1529.) The number of titles changing hands in England was estimated by Sir R. Torrens at from 900 to 1,000 *per diem*. (Report, 1878, p. 150, No. 3150.)

Objections to compulsory registration drawn from the hardship which it would inflict upon landowners might be met, by admitting that such a step would impose a heavy burden upon the existing generation of landowners, and contending that the State may reasonably impose upon them this burden, for the sake of some great benefit to be reaped by subsequent generations. But however well founded the expectation of future benefit to other people may be, it is unlikely that this will reconcile the existing generation to the prospect of a present injury to themselves.

If we consider the causes which have led to the failure of registration of titles in England, or the causes which have elsewhere made it a success, we shall equally arrive at the above-stated conclusion, that some wide departure must be made from the procedure of Lord Westbury and Lord Cairns; and we shall perceive two different directions in which such a departure might be made. In England, registration of titles has failed, chiefly because people disliked the preliminary expense and the risk of failure. These objections would be met if the expense could be reduced to a trifle, and all risk of failure could be avoided; which conditions could hardly be fulfilled, unless by registering every possessory title as indefeasible, with indemnity, of course, to all persons thereby damaged. In Australia, registration of titles has practically succeeded, chiefly because all titles there start from a recent root, and are free from the complication of settlements. These considerations suggest for adoption one or the other, or both, of the following courses:—

(1) Registration of every possessory title as immediately indefeasible; with indemnity, either by the State alone, or with the aid of an insurance fund, to persons injured.

In the case of settled lands, the analogous proceeding would be to enter upon the register, as having power indefeasibly to convey the fee simple, the person who is for the time being in possession, or receipt of rents and profits, as tenant for life, under the settlement.

(2) Reducing English titles, by fundamental changes in the law, to the simple state in which titles existed in Australia previously to the introduction of registration. This would also imply the completion of a cadastral survey of sufficient accuracy for the determination of the parcels even in town lots.

If the former of the methods should be adopted, the following points require to be noticed:—

(1) The proposal that the State should indemnify persons damaged by the register is a serious one; not so much, perhaps, from the risk incurred at the beginning through bad titles, as from the risk subsequently incurred through fraud. Reference may again be made to the evidence previously cited (*supra*, p. 73) on the losses of the Bank of England through frauds on the stock registries. It would be rash to assume that the loss incurred by the State, if it should undertake the indemnity, would not be large. On the other hand, if provision for indemnity is made by an insurance fund, this would imply a continual tax upon all titles, the amount of which ought previously to be made the subject of inquiry.

(2) Greater facility in detecting fraud and personation might be attained by establishing numerous district registries; such facility increasing in proportion to the smallness of their areas. But if these areas were large little would be gained; while, if they were small, some difficulty might be experienced in finding a sufficiently large number of men qualified to exercise the extensive powers of the Registry Office.

(3) The objection derived from the possible danger to landowners might effectually be met, by providing that, in case of fraud, the compensation should go to the *defrauded purchaser* instead of to the owner. It is clearly more in accordance with equity, to allow the true owner to keep his land and to compensate the defrauded purchaser in money for the loss of his purchase, than to allow a purchaser to evict an innocent owner and to force the latter to accept a money compensation. Such an arrangement would in no way interfere with the efficiency of the registry, if it could in other respects be made efficient. It must be assumed that successful frauds would in practice continue to be rare, because it would otherwise become necessary to put an end to the registry. Their possible occurrence would, therefore, not weigh heavily with purchasers; and under the proposal above made, the hardship on a defrauded purchaser, who would get back his purchase-money and costs, would be extremely small, while on the other alternative the hardship on the innocent landowner would be extremely great.

It would not, however, be necessary to extend this proposal to dormant claims; and in such cases the title of the purchaser might be allowed to prevail.

The second possible course would be to open the way to registration of title, by previously making the titles to and dealings with land in England as simple as they are in the Australian colonies. The success in Australia of the system of registration there known as the Torrens System* has

* A return was ordered by the House of Commons to be printed on the 8th May, 1872, containing the replies made to a circular letter addressed by Lord Granville, then Secretary of State for the Colonies, to the Governors of South Australia, Queensland, New South Wales, Victoria, and Tasmania, with reference to the system of registration in operation in those colonies. No reply from Queensland had been received at the time of going to press; but a great deal of information is given in relation to the other colonies, and also to New Zealand.

The system adopted in all the Australian colonies is that known as the Torrens System, from its distinguished originator and advocate, Sir Robert R. Torrens, K.C.M.G. He states that the same system has also been adopted in British Columbia, Fiji, New Zealand, and the United States of America. (Report, 1878, p. 142, Nos. 3058, 3059.)

The respective dates at which the system was established appear from the above-mentioned return to be as follows:—in South Australia, 1858, amended 1861; in New South Wales, 1863; in Victoria, 1862, amended 1866; in Tasmania, 1862, amended 1863 and 1868; and in New Zealand, 1870.

The system has also been established in Queensland.

The following information, illustrating the working of the insurance funds established in Australia, will be found of interest:—

(1) New South Wales. The fund is formed by a rate of $\frac{1}{2}d.$ in the pound on the estimated value of the land, payable on its being first placed on the register, and also on every transmission by death or by succession in a settlement; but not on an absolute transfer *inter vivos*. The fund amounted at the end of 1869 to about 6,500*l.*; and up to that time no claim had ever been established against it. (Report, 1872, pp. 2, 3.)

(2) Victoria. The amount of the fund on 31st July, 1870, was 14,160*l.* 17*s.* 3*d.*; only one claim had been established against it, for a sum of 225*l.*, paid as indemnity to a lawful owner who had been evicted under a registered title obtained through fraud and personation. (*Ibid.* p. 96.)

(3) Tasmania. The rate was originally $\frac{1}{2}d.$ in the pound, but was afterwards reduced to $\frac{1}{4}d.$ The amount of the fund in July, 1870, was 1,650*l.* No claim had ever been established against it. (*Ibid.* p. 136.)

(4) South Australia. One small claim only had been established against the fund by May, 1870. The registrar stated that this was under the first Act; and that in his opinion the subsequent Act of 1861 had made effectual provision against similar frauds. (*Ibid.* p. 153.)

induced many people to talk as if it contained some inherent power of working miracles. The secret of its success is to be found in the peculiar conditions under which it has been

applied. There is little reason to suppose that the compulsory introduction of the Torrens System into England would result in anything but disaster, unless the way should be previously opened by introducing into England conditions as favourable as those which existed, and still exist, in Australia.

The difference between the conditions in Australia and in England is not so much a difference in the law as a difference in the practice. Settlements, for example, are as lawful in Australia as in England; but in England their use is exceedingly prevalent, while in Australia they are almost unknown. So, also, in England, as in Australia, every title must theoretically start with a grant from the Crown; but in Australia such Crown grants actually are the ordinary root of title, while in England they occur in practice only under the most exceptional circumstances.

The following account of the Torrens System is abstracted from a paper contributed by Sir R. Torrens to the "Social Science Transactions" of 1863:—

The system of registration is compulsory as regards all new titles created (by grant from the Crown) since the establishment of the system, but optional as regards titles of older date.

Upon the creation, by Crown-grant, of a new title, a "certificate of title" is issued as of course. With regard to older titles, the certificate is not issued until the title has been examined and declared satisfactory by the Lands Titles Commission. This body, in its constitution and procedure, resembles the Irish Estates Court.

Certificates of title are executed in duplicate, one being delivered to the registered owner and the other retained at the office. This certificate must be produced at the registry office when any dealing with the land to which it relates is to be effected.

For every parcel of land, for which a separate certificate of title has been issued, a kind of "account current" is opened upon a separate *folium* of a register, formed by binding up the office duplicates of certificates of title.

In this account are, from time to time, entered up memorials of all dealings with that parcel, either by way of creating derivative estates, or by way of mortgage, until a change occurs in the ownership of the fee.

Thereupon the existing account is closed, a fresh certificate of title is issued, and a new account is opened upon a separate *folium*, all derivative estates and mortgages by which the fee continues to be affected or incumbered, being "carried forward" to the new account.

Upon a division of the land by means of a partial sale, a new account is opened in respect of the part purchased. The part retained by the vendor is either made the subject of a new account, or (if the proprietor should desire this with a view to future sales) it is left upon the old account, with a notification of the partial sale.

It is obvious that the success of the system in Australia cannot rationally be referred to such mere matters of book-keeping as the above-stated details; and that this must rather be referred to the favourable conditions under which the system was introduced: namely, that the whole of the soil, where not held by the Crown itself, was held under recent Crown grants, conferring indefeasible titles upon the grantees; and that the practice of settling land was almost unknown.

The former of these conditions might, as above mentioned, be fulfilled in England by accepting all possessory titles as indefeasible. The latter could be fulfilled only by forbidding settlements to be made, either absolutely, or partially; or by allowing them to be made only by means of trusts, which would not be placed upon the register, and would not interfere with the powers of the registered owner, as between himself and strangers to the trust.

The proposal entirely to forbid, or seriously to curtail, the

existing power of settlement, as distinguished from permitting settlements to be made by means of trusts, would certainly be felt as a great hardship; because the fact that the right is very extensively exercised in practice, is the precise reason which must be alleged for interfering with its exercise. If any material restriction of the power of settlement is to be introduced, it must be justified upon other considerations than those connected with the establishment of a registry.

The exercise of the power of settling land is as nearly universal as any practice which is authorized by English law. Here, of course, reference is made not only to what are styled "strict settlements," but to every devolution or disposition, whether by descent or by deed or will, other than a conveyance or specific devise of the whole estate or interest of a person, or the descent of a fee simple. Taking the words in this wide sense, the practice of settlement is quite common even in the humbler ranks of the yeomanry. And the question of abolishing or curtailing the right is not less important to persons desirous of becoming, than to those who already are, owners of land.

Amongst other questions, it will, therefore, have to be considered, whether any advantages which landowners could gain by the facilitation of sales and mortgages, would compensate them for the loss of their power of settlement.

It can hardly be anticipated that a considerable section of the people will readily acquiesce in the abolition of a right, which has been long and freely exercised, and which, by their constant exercise of it, they show such a strong disposition to prize. This holds out the prospect, that any proposals which involve the abolition of the right of settlement, may provoke a widespread opposition, which would not be aroused by proposals such as are in substance compatible with the existing practice. Against proposals to abolish the right of settling land alone, the argument will be urged, that, instead of assimilating the law of land to the law of personal property, they propose to introduce a novel distinction of more fundamental importance than any which now exists. This

objection might logically be met, by further proposing to abolish the right of settling personalty. To adopt this suggestion would probably ensure, as soon as it came to be generally understood by the public, much additional opposition. But the reasons of policy which are considered to render desirable some restriction of the right of settling land, do not apply with equal force, if at all, to the right of settling personalty.

The conclusion follows that, apart from political considerations, less opposition would be encountered by any scheme of registration which would leave the existing power of settlement unaffected in its extent, while avoiding the inconvenience of particular estates and similar causes of complication, by relegating all such matters to the status of trusts, binding upon the parties *inter se*, but not hampering the dealings of the registered owner with strangers to the trust. Such a land registry would rather be formed upon the model afforded by the existing stock registries, as above explained at p. 14, than upon the model afforded by the Torrens System. The fact that the last-mentioned system admits the complication of settlements, is of no present importance in Australia, where settlements are practically non-existent; but it would be a strong objection in England, where their use is general.

In constructing any such scheme, those points must not be lost sight of, in which land differs by nature from stock, and in which no Act of Parliament can cause the two things to resemble one another. In the case of land, it is of the very essence of the matter that the title shall refer to some *definite and particular parcel;* and this involves the ascertainment both of particular quantities and of particular boundaries. In the case of stock, this question does not arise. Moreover, since parcels of the same stock are identically alike, except in quantity, there is a constant market for such a commodity, which is free from the disturbing elements introduced by the numerous motives which influence purchasers with regard to particular parcels of land.

It is to be observed, that the last-mentioned class of motives, which in England are of general occurrence and potent effect, can hardly be said to exist in Australia. Land is not there generally regarded with any feelings due to particular sentiment; but is dealt with merely as a subject of commerce or convenience, like corn or timber.

But even those who would deprecate anything which could be represented as a deprivation of the power of settlement, may admit that suggestions might be made for the improvement of this branch of the law, in which the public would readily acquiesce, and which seem intrinsically to be of great value.

The time over which the derivation of successive interests created by settlements can now be protracted, seems to be unreasonably long. The period within which, under the present law, executory limitations must vest absolutely, is a life or lives in being, with the optional addition of 21 years as a term in gross. Lord Brougham expressed the opinion, in *Cole* v. *Sewell*, 2 H. L. C. 186, at p. 233, that this further term of 21 years ought never to have been admitted by the law. The period of a life or lives in being would probably satisfy the reasonable wishes of settlors; and executory limitations both of real and personal property might with advantage be restricted within that limit.

It would also be possible to effect a considerable simplification, both in the law of property and (by consequence) in the practice of conveyancing, by promoting measures for more closely assimilating the law applicable to real property to the law applicable to personal property. The historical reasons upon which the wide distinctions between these two systems of law were once grounded, have for centuries ceased to have any weight.

A great step would be taken in this direction by a judicious measure for the prevention of the future limitation of estates tail: one of the principal distinctions which still divide real

from personal property lying in the fact, that any limitation or disposition which, if applied to real estate, would create an estate tail, has, if applied to personal estate, a different effect. If such a limitation is applied to leaseholds, personal chattels, government stocks, money investments, and similar classes of personal property, it is sufficient to give the property absolutely to the person named in the limitation. The law might perhaps advantageously be altered so as to adapt this analogy to limitations of all kinds of property. It would not be just to introduce any abrupt and violent alteration of rights already acquired, or capable of being acquired, under existing settlements; but every estate tail already in existence, whether vested or contingent, should be *ipso facto* enlarged into a fee simple, so soon as any person is in existence who has power, without the consent of any other person, to effect such an enlargement under the existing law.

It is not intended to enter upon the precise legislative details for effecting the change above indicated. The proposal might either include the repeal of the statute *De Donis*, or that statute might be left in existence as a part of the machinery for effecting the proposed object.

The abolition of estates tail would greatly facilitate the institution of a "real representative," in whom the real estate of a deceased person might be made to vest, in the manner in which personal estate is now vested in the "personal representative," (that is, the executor or administrator,) subject to similar powers of disposition. But it has already been pointed out (*supra*, p. 53) that it is doubtful how far this change in the law would facilitate the transfer of land, except in connection with a scheme for the registration of titles. Under the existing law, only a small proportion of the assignments of leaseholds which occur in practice are made by personal representatives; and there is no reason to suppose that, while the practice of conveyancing remains substantially unaltered, any larger proportion of conveyances of freeholds would be made by "real representatives."

The proposal has been sometimes made, to effect the object aimed at in the institution of a "real representative," by enacting that every fee simple should be transformed into a very long term of years, say 10,000 years; with the result, that such estates would thenceforward vest under the existing law in the executor or administrator. The reasons urged by the Real Property Commissioners of 1829 against the proposal to abolish tenure, seem to apply with at least equal force against the proposal to convert fees simple into long terms of years:—

> "The necessity would immediately arise, of providing by positive enactment for all the rules deduced from tenure which it is intended to preserve. Some of these, notwithstanding the greatest care, would probably escape attention; many questions would arise upon the meaning of the terms in which the existing law would be declared, and all the dangers and evils of codification would be encountered without its advantages." (Third Report, p. 4.)

The proposal above referred to would probably turn out to be as dangerous and complex a device as could be adopted; and it might constitute a fertile source of litigation for many years.

There exist certain special laws, which partly relate to the revenue and the rights of the Crown, and which, therefore, have hitherto been obstinately defended by the revenue authorities, though they scarcely seem to be indispensable to the public welfare, while they undoubtedly constitute a serious obstacle in the way of simplifying the existing conditions of land transfer. The opinion seems to be generally entertained, that in the following particulars the law might be altered with advantage to the public:—

(1) That the claim of the Crown for succession duty should be barred, as against a purchaser for value, upon the expiration of twelve years from the date of the purchase.

(2) That the lien of the Crown for debts of record or specialty should be abolished, and the register closed.

The following proposals may also be suggested, as being worthy of consideration:—

(3) That "official searches" for bankruptcies should be instituted, to be conducted upon the same footing as the official searches provided for by the Conveyancing Act, 1882, s. 2. Or, as an alternative, that the right of trustees in bankruptcy to claim as against real estate, should be assimilated to the right as against personal estate.

(4) That the law relating to the registration of judgments, and of executions issued thereupon, should be remodelled, with a view to the better protection of purchasers, and also with a view to making the remedies of creditors more uniform and abolishing any distinction between legal and equitable execution.

Registration of Assurances with a view to future Registration of Titles.

The foregoing remarks will probably have gone far to convince the reader, that the previous examination of the titles to be registered constitutes the most formidable obstacle in the way of a registry of titles. If an immediate registry is desired, this obstacle can be overcome only by the method above indicated, viz., the registration of all possessory titles as immediately indefeasible, with indemnity to any persons thereby injured. This latter proposal lies open to obvious objection; and in order both to avoid the immediate difficulty, and ultimately to secure the advantage of a registry of titles, the middle course has been proposed, of enforcing the registration of all titles, merely as possessory and for what

they are worth, to be followed by the registration of all subsequent dealings with them. If the register were made conclusive evidence of the subsequent dealings—which might safely be done if proper precautions were adopted in keeping it—the lapse of time would gradually render obsolete all examination of the title prior to the registration, and it might some day be possible, without difficulty or danger, to transform the register into a register of titles.

Several schemes for effecting this object have lately been advocated by persons of eminent ability and learning. For the present purpose, they may be divided into those which do not, and those which do, propose to interfere materially with the existing law of settlement.

Schemes which propose to leave the existing law substantially unaltered, cannot differ (apart, of course, from the question of compulsion) in anything but mere book-keeping details from that part of Lord Cairns' scheme which permits the registration of possessory titles.

They are open to precisely the same observations as have been made above with reference to schemes for the registration of mortgages. They could undoubtedly be carried into effect, without being followed by any startling or disastrous consequences. They would cost a great deal of money, and for a good many years they would cause a serious amount of inconvenience in the transaction of business. The difficult question remains to be considered, whether the advantages ultimately to be gained from them, would repay, or more than repay, the preliminary cost and trouble.

Schemes which propose to effect any substantial alteration, by way of curtailment, in the law of settlement, are open to the above-stated objection, that they may provoke a wide-spread hostility as soon as their object is understood by the public.

Such schemes seem to belong rather to the subject of political reforms than of legal reforms, and to be supported

rather from political considerations than from the desire to facilitate the transfer of land between ordinary vendors and purchasers, however useful they might indirectly prove for that purpose.

Moreover, schemes which propose materially to curtail the right of settlement, without abolishing it altogether, are open to the further objection, that they go far enough to insure the opposition of the public, without going far enough effectually to remove the obstacle with which they are dealing. The proposal either goes too far or not far enough. It is like the proposal of Lord Cairns, to overcome the general dislike of Lord Westbury's Act, by offering to register "good" titles as distinguished from "marketable" titles. No doubt the two things are for some purposes very different; but for the present purpose they are exactly the same. The truth of this conclusion was proved by the event.

General Remarks.

The contemplation of benefits plausibly deduced from registration of titles has sometimes blinded the eyes of the ablest and most single-minded advocates to the difficulties which are inseparable from their proposals, and has caused them to magnify the evils of the present system, as the foundation of an argument in favour of another. In the evidence of Sir Robert Torrens, before Mr. O. Morgan's Committee, the following remarks occur:—

"I will state a case in point. I was interested in an estate at Bromley which was worth about 1,000*l.* an acre. It was purchased by a speculator who wanted to cut it up into patches for villas; the examination of the title took a year and a half, and it cost us 300*l.*; the person who subdivided the property amongst the holders of the villa sites, gave them each a printed form of conveyance, which cost a mere nothing, 10*s.*, or something of that sort; but they are now in this predicament: the solicitor of the vendors approved of their titles, but after building houses and putting a couple of thousand pounds upon their lands, if they wanted to mortgage or deal in any way with their interests, the solicitors for the mortgagees or the purchasers will have to look into the back title; and here are men with one-acre plots

which they bought for 1,000*l.*, saddled with a title which cost 300*l.* to investigate; all that is done away with by registration of titles." (Report, 1878, p. 144, No. 3092.)

It cannot be denied that cases such as the foregoing ought to be taken into account; but such cases do not seem to be sufficiently common to constitute a motive of overwhelming importance; and it appears from other parts of his evidence that Sir R. Torrens has greatly under-estimated the difficulty of introducing into an old and elaborately organised community like England, institutions which have been found to work well under the totally diverse conditions of Australia. He appears also to have formed a much exaggerated estimate of the evils of the existing English system, and to be by no means fully aware of the rapidity with which that system has of late years been moving towards the ends which he desires, though by different means. It is notorious among persons who are practically conversant with conveyancing business, that for some years past solicitors have shown an increasing disposition, in small transactions, to accept shorter titles, and to insist less strongly upon embarrassing requisitions. In country places where titles are well known by reputation, it is not unfrequently found practicable to effect conveyances on sales without formal investigation of the title, and at a very cheap rate. The following evidence was given by Mr. W. Barber before Mr. O. Morgan's Committee:—

"In the case of small purchases in the country, this sort of thing frequently happens, as I was told by a country solicitor in large practice, talking upon the question of registration some years ago. He says, a man coming into my office, will say, I have bought a plot of land of So-and-so for 20*l.*; you must deed it to me for 1*l.*; 1*l.* is all I can give you. The solicitor says that in a country place he knows the title of everybody round; no investigation of the title is required; the transaction is completed for 1*l.*, and in those cases abstracts are not required, and the title is very seldom investigated." (Report, 1879, p. 48, No. 884.)

A similar argument, having special application to mortgages, is thus stated by Mr. H. W. Elphinstone, in an able and interesting paper on land transfer, which appeared in the January number of the Law Quarterly Review:—

"It often happens that shortly after the completion of the purchase, the purchaser desires to borrow money on mortgage of the purchased property; in this case he has to incur the expense of copying the abstract already investigated on his behalf, and of preparing an abstract of the conveyance to him. The whole of the title has again to be investigated on behalf of the mortgagee; and it may even happen, if the purchase has been made under stringent conditions of sale, that the mortgagee may reject his title." (Page 16.)

It seems, however, necessary to qualify this passage by the proviso, *in case he is required by the mortgagee so to do;* and the question, whether and how far it is the common practice to require such double investigation, needs an answer. The following passage may be cited from the evidence given by Mr. Dees before Mr. O. Morgan's Committee, which has been above referred to:—

"822. In the case of a person having recently bought a property and then wishing not long afterwards to mortgage it again, is there any mode or process, under the present state of things, by which he can prevent the recurrence of the cost of investigation of title by the mortgagee's solicitor?—I think not. A fresh investigation cannot be absolutely precluded.

"823. Therefore, although he has recently bought the property, and has had the title thoroughly investigated, he has to incur the cost again when he mortgages?—If the mortgagee's solicitor should think it necessary; but we must consider what is usual.

"824. Do not they usually do so?—Then would come the same question as I was asked as to a new purchase. I should say not.

"825. Is not the mortgagor, in that case, at the mercy of the mortgagee's solicitor?—He is at his mercy in one sense; but we do not usually find that persons are willing to behave badly or unreasonably." —(Report, 1879, p. 43, Nos. 822—825.)

It is believed that in cases where the conduct of the purchase was in the hands of practitioners of known respectability, it is not uncommon, upon a mortgage shortly after-

wards made, to dispense with the double investigation of the title. But the considerations which especially require attention are the following:—(1) It is not easy to see how, in practice, any novel system could render trifling the costs of sales and mortgages, unless the average English citizen could be made capable of effecting such transactions in his own person, without assistance; and it is very doubtful whether this result is likely to be speedily arrived at. (2) In those cases where the mortgagee has the preponderating voice, no improvement in conveyancing could prevent his solicitor, if a man of hard and unscrupulous conduct, from using some of the means at his disposal to extort costs from the mortgagor, without making any allowance for a recent examination of the title; and it does not appear that, under the existing system, such a course is common.

Whatever legislation may be attempted, it is important that its promoters should not enter upon their proposed labours under a too confident belief, that it is a simple task to remodel by an Act of Parliament all the forms under which a great part of the business of the country is at present transacted.

Summary of Suggestions.

It seems expedient to gather under one head the principal suggestions for the amendment of the law which have been referred to in the course of the foregoing remarks.

(1) That no accumulation of income should be allowed, under the provisions of a settlement, except during the infancy of a person absolutely or contingently entitled to the *corpus* of the fund.

If this provision should be enacted, the Thellusson Act, 39 & 40 Geo. 3, c. 98, would become superfluous, and might be repealed.

(2) That so much of the Statute of *Quia Emptores* should be repealed, as forbids subinfeudation: thus allowing a perpetual rent to be reserved by way of rent-service incident to tenure.

This would enable building schemes to be much more conveniently carried out, in those parts of the country where it is the custom to grant building land for a fee simple instead of for a term of years.

(3) That "acknowledgments" by women under coverture, who were married before 1st January, 1883, should be abolished.

(4) That every executory limitation should be made to vest absolutely within the space of a life, or lives, in being at the date of the limitation.

(5) That the future limitation of estates tail should be disallowed, and fees simple substituted in their place. And that every estate tail, whether vested or contingent, in existence at the passing of the Act, should be *ipso facto* enlarged into a fee simple, so soon as any person has power, under the existing law, to bar the entail without the assent of any other person.

(6) That the claim of the Crown for succession duty should be barred, as against a *bonâ fide* purchaser for value, upon the expiration of twelve years from the date of the purchase.

This provision would place the Crown, in respect to claims for succession duty, upon the same footing as a subject in respect to actions for the recovery of land.

(7) That the lien of the Crown for debts of record or specialty should be abolished, and the register closed.

(8) That "official searches" for bankruptcies should be instituted, to be conducted upon the same footing

as the official searches provided for by the Conveyancing Act, 1882, s. 2. Or, as an alternative, that the right of trustees in bankruptcy to claim as against real estate, should be assimilated to the right as against personal estate.

And official searches might perhaps be usefully instituted in respect of all charges and liabilities, wheresoever registered or recorded, affecting lands.

(9) That the law relating to the registration of judgments, and of executions issued thereupon, should be remodelled, with a view to the better protection of purchasers, and also with a view to making the remedies of creditors more uniform and abolishing any distinction between legal and equitable execution.

If the legislature should resolve to enact some scheme for the compulsory registration of titles, the following observations may be offered:—

(1) That no scheme ought to be entertained which does not provide adequate compensation for persons injured by the existence of the register.

(2) That, except in the case of dormant claims, the compensation should be paid by way of indemnity to the defrauded purchaser, and that the landowner should retain the land.

(3) That no scheme is likely to meet with success, which does not proceed upon the principle, either of registering possessory titles as indefeasible without examination, or of excluding settlements from the register.

(4) That it would be difficult, without first effecting some complete change in the opinions of many persons of nearly every class in the kingdom, to abolish, or seriously curtail, the right of settlement.

(5) That any such register might probably be constructed, with less opposition, upon the model of the existing registers of Government stocks, all rights subordinate to the absolute power of disposition being relegated to the status of trusts and equities.

(6) That the scheme should include the institution of a "real representative," having the same right and power to dispose of the freehold estates of a deceased person, as is vested in the personal representative with respect to chattels real.

(7) That the scheme should provide for the registration of the title of persons acquiring title by possession, rather than that the operation of the Statutes of Limitation should be excluded as against registered owners.

(8) The lien of a vendor for unpaid purchase-money might be noticed on the register, and provision made that, unless registered, such lien should confer no claim as against a purchaser, even with notice of the lien.

(9) Provision should be made for noticing on the register all restrictive covenants, and might be made for noticing ascertained easements, affecting registered lands.

The following points, with respect to which proposals for altering the existing law have been brought before the public, some of which are at present under the consideration of Parliament in the bill introduced by Mr. Ince, Q.C., M.P., have not, for the most part, been mentioned in the foregoing pages. Their connection with the present subject is not sufficiently direct to make the discussion of them appropriate in this place. But they perhaps require some notice, as being likely, if judiciously dealt with, either to facilitate the establishment of a registry of titles, or to increase the

utility of such a registry when established, or to facilitate the transfer of land under the existing system of conveyancing.

(1) The abolition of copyhold and other peculiar tenures, and of the customs of gavelkind, borough-english, and other special customs of descent.

(2) The assimilation of the law regulating the descent of real estate to the law regulating the descent of personal estate.

(3) Whether the present law of descent be retained or not, some limit might perhaps be introduced, so that no right of succession should be recognized in any case where the relationship of the heir-at-law or next of kin to the deceased does not fall within a specified degree.

(4) The laws relating to the acquisition and holding of lands and interests in land by corporations and charities require amendment and simplification.

(5) The consolidation and codification of statutes affecting real property, if judiciously effected, would be a work of great practical utility and public benefit.

In drawing these remarks to a conclusion, it remains only to add that the object in view has been to afford, in a short form, some information which may be useful to those interested in the subject, whether professionally or otherwise; and to suggest considerations telling for or against the various schemes discussed, without adopting or advocating any of them, or attempting to pronounce any final opinion upon their feasibility or expediency.

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